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United States
Circuit Court of Appeals

For the Ninth Circuit.

CRANE CREEK IRRIGATION DISTRICT, a Corporation, and SUNNYSIDE IRRIGATION DISTRICT, a Corporation,

Appellants.

VS.

PORTLAND WOOD PIPE COMPANY, a Corporation, et al.,

Appellees.

Filed

SEP 2 1915

Transcript of Record

F. D. Monckton,
Clerk.

RECEIVE

AUG 27 1915

F. D. MONCKTON,
CLERK

Upon Appeal from the United States District Court for
the District of Idaho, Southern Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CRANE CREEK IRRIGATION DISTRICT, a Corporation, and SUNNYSIDE IRRIGATION DISTRICT, a Corporation,

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PORTLAND WOOD PIPE COMPANY, a Corporation, et al.,

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Names and Addresses of the Attorneys of Record.

C. S. VARIAN, Salt Lake City, Utah,
E. R. COULTER, Weiser, Idaho,
*Solicitors for Appellants, Crane Creek
Irrigation District and Sunnyside
Irrigation District.*

RICHARDS & HAGA, Boise, Idaho,
Attorneys for Defendants in Error.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a Corpora-
tion, *Plaintiff,*

vs.

SLICK BROTHERS CONSTRUCTION COM-
PANY, Limited, a corporation, CRANE CREEK
IRRIGATION LAND & POWER COMPANY, a
corporation, CRANE CREEK IRRIGATION
DISTRICT, a corporation, SUNNYSIDE IRRI-
GATION DISTRICT, a corporation, IDAHO NA-
TIONAL BANK, a corporation, C. R. SHAW
WHOLESALE COMPANY, a corporation, MA-
NEY BROTHERS & COMPANY, a co-partner-
ship, UTAH FIRE CLAY COMPANY, a corpora-
tion, PETE MARCH, G. A. HEMAN, J. M.
PINCKARD, F. A. SQUIER, S. C. COMER-
FORD, JIM MIREHOUSE, GUY COMERFORD,
WM. R. COMERFORD, H. H. BEYLEY, JAMES
M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F.
SMITH, CLAUD F. SMITH, HENRY WHIT-
MORE, A. T. SCHWAB, L. F. EASTON, A. L.
CHENOWETH, GEO. C. CATER, J. C. TONEY,
THOMAS SHERRY and E. H. HASBROUCH,
Defendants.

BILL OF COMPLAINT.

*To the Honorable, The Judges of the District Court
of the United States, for the District of Idaho,
Southern Division:*

Portland Wood Pipe Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen of the State of Oregon, brings this its bill of complaint against Slick Brothers Construction Company, Limited, a corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, Crane Creek Irrigation Land & Power Company, a corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, Crane Creek Irrigation District, a corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, Sunnyside Irrigation District, a corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, Idaho National Bank, a corporation organized and existing under the laws of the United States and doing business in the State of Idaho, and a citizen of said State, C. R. Shaw Wholesale Company, a corporation organized and existing under the laws of the State of Nevada and doing business in the State of Idaho under and by virtue of a compliance with the laws of the State of Idaho, and a citizen of said State of Nevada, Maney Brothers & Company, a co-partnership consisting of J. W. Maney and John Maney, each a citizen and resident of the State of Oklahoma, and H. G. Wells and E. J. Wells, each a resident and citizen of the State of Idaho, co-partners under the firm name of Maney Brothers & Company, Utah Fire Clay Company, a corporation organized and existing under the laws of the State of Utah and a citi-

izen of said State, Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Beyley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, L. F. Easton, A. L. Chenoweth, Geo. C. Cater, J. C. Toney, Thomas Sherry and E. H. Hasbrouch, each residents and citizens of the State of Idaho, and G. A. Heman, a resident of St. Louis, Missouri, and a citizen of said State of Missouri; and your orator complains and alleges:

I.

That the said defendant, Slick Brothers Construction Company, Limited, is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Boise, Ada County, Idaho, and is a citizen of the State of Idaho.

II.

That the defendant, Crane Creek Irrigation Land & Power Company, is, and at all the times herein-after mentioned was, a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Weiser, Washington County, Idaho, and is a citizen of the State of Idaho.

III.

That the defendants Crane Creek Irrigation District and Sunnyside Irrigation District are, and at all the times hereinafter mentioned were, corpora-

tions, and each of them is a corporation, organized and existing under the laws of the State of Idaho, and particularly under the provisions of Title 14, Political Code, Revised Codes of Idaho, and the laws supplemental to and amendatory thereof, with their principal place of business at Weiser, Washington County, Idaho, and each of them is a citizen of the State of Idaho.

IV.

That the defendant Idaho National Bank is, and at all the times hereinafter mentioned was, a corporation organized under the laws of the United States, and engaged in general banking business as a National Bank in the City of Boise, Ada County, Idaho, and is a citizen of the State of Idaho.

V.

That the defendant C. R. Shaw Wholesale Company is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Nevada, and doing business in the State of Idaho under and by virtue of a compliance with the laws of the State of Idaho, with its principal place of business at Boise, Ada County, Idaho, and is a citizen of the State of Nevada.

VI.

That the defendant Maney Brothers & Company is a co-partnership composed of J. W. Maney and John Maney, each a resident and citizen of the State of Oklahoma, and H. G. Wells and E. J. Wells, each a resident and citizen of the State of Idaho.

VII.

That the defendant Utah Fire Clay Company is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Utah, and is a citizen of the State of Utah.

VIII.

That each of the following named defendants, to-wit: Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Beyley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, L. F. Easton, A. L. Chenoweth, Geo. C. Cater, J. C. Toney, Thomas Sherry and E. H. Hasbrouch, is, and at all the times hereinafter mentioned was, a resident and citizen of the State of Idaho.

IX.

That the defendant G. A. Heman is, and at all the times hereinafter mentioned was, a resident of St. Louis, Missouri, and is a citizen of the State of Missouri.

X.

That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

Your orator further shows that at all the times hereinafter mentioned the said defendant Crane Creek Irrigation Land & Power Company was, and still is, the owner and reputed owner of, and the said

defendant Crane Creek Irrigation District and Sunnyside Irrigation District own or claim to own some interest or estate in, that certain Irrigation system, works and water rights situated in Washington County, State of Idaho, consisting of:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the government of the United States.

(b) All canals, ditches, head gates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used or required in connection with the distribution of the water from said reservoir and for carrying and distributing said water to the place or places of intended use; and all rights of

way therefor; and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section Seven (7), Township Eleven (11) North, Range Three (3) West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30 and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19 and 18 in Township 10 North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (N. E. $\frac{1}{4}$) of Section 23, Township 10 North, Range 5 West, B. M. Also that certain siphon and branch canal, branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (N. W. $\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23 and 22, and in a southerly and westerly direction through Sections 27, 28 and 32, Township 11 North, Range 4 West, B. M. And all branch canals, main and subordinate laterals, service ditches, pipe lines, head gates and other structures of every kind and nature, used or intended to be used

in connection with said irrigation system, or any part thereof.

(c) Also all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures hereinbefore described, now owned or that may hereafter be acquired for use in connection with said irrigation system, works and structures, and particularly the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, Page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

Permit No. 8507, recorded Book 27, page 8507, issued Aug. 10, 1912.

XII.

That the said defendant Slick Brothers Construction Company, Limited, on or about the 2nd day of April, 1913, entered into a contract in writing with the said defendant Crane Creek Irrigation Land &

Power Company for the construction of the irrigation system, works and structures above described; which contract was thereafter and on or about the 8th day of November, 1913, supplemented and modified by a certain other agreement between said parties relative to the construction of said works. And the said defendant Slick Brothers Construction Company, Limited, pursuant to the terms of said contracts, entered upon the construction of the said works, and while so engaged in such construction and on or about the 9th day of February, 1914, purchased from the said plaintiff, Portland Wood Pipe Company, for use in the construction of said irrigation system, works and structures certain wood stave pipe material to be used in the erection thereof to the amount and at the prices following, to-wit:

Staves for eleven hundred and forty-five (1145) feet of twenty-four (24) inch pipe, with a finished thickness of shell of one and one-half ($1\frac{1}{2}$) inches, in accordance with the specifications, and staves for nine hundred thirty-five (935) feet of twenty-four (24) inch pipe with the same finished thickness of shell.

The necessary metal tongues of No. 12 Gauge, to be used between the butt end joints of staves.

Ninety-one hundred and fifty-six (9156) half inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

Ninety-one hundred and fifty-six (9156) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Three Thousand Forty-three and 25-100 Dollars (\$3,043.25).

Also the following material, to-wit:

Staves for eighteen hundred fifty-one (1851) feet of sixty-two (62) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inches.

The necessary metal tongues of No. 12 Gauge to be used between butt end joints of staves.

Seventy-nine hundred eighty-one (7981) five-eighths ($\frac{5}{8}$) inch bands in two pieces, complete with nuts and washers, bands bent to form and coated prior to shipment.

Fifteen thousand nine hundred sixty-two (15,962) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Nine Thousand One Hundred and Ninety-eight Dollars (\$9,198).

Also the following material, to-wit:

Staves for seven hundred thirty (730) feet of fifty (50) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inches, and staves for twenty-one hundred seventy (2170) feet of fifty (50) inch pipe with the same finished thickness of shell.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

Eighteen thousand seven hundred eighty-five (18,785) five-eighths ($\frac{5}{8}$) inch bands in one

piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

Eighteen thousand seven hundred eighty-five (18,785) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Fourteen Thousand Two Hundred Nine and 34-100 Dollars (\$14,209.34).

Also the following material, to-wit:

Staves for thirty-three hundred ninety-two (3392) feet of forty-two (42) inch pipe, with a finished thickness of shell of one and five-eighths ($1\frac{5}{8}$) inches, and three hundred fifteen (315) feet of forty-two (42) inch pipe with the same thickness of shell.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

Five thousand eight hundred thirty-three (5833) half ($\frac{1}{2}$) inch bands in one piece; fifty two hundred sixty-five (5265) five-eighths ($\frac{5}{8}$) inch bands in one piece; all complete with nuts and washers, bands bent to form and coated prior to shipment.

Five thousand eight hundred thirty-three (5833) malleable cast iron shoes to be used with one-half ($\frac{1}{2}$) inch bands; five thousand two hundred sixty-five (5265) malleable cast iron shoes to be used with five-eighths ($\frac{5}{8}$) inch bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Seven Thousand Two Hundred Forty-two and 60-100 Dollars (\$7,242.60).

Also the following material, to-wit:

Staves for eight hundred twenty (820) feet of fifty-four (54) inch pipe with a finished thickness of shell of one and seven-eighths ($1\frac{7}{8}$) inches.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

One thousand five hundred eighty-three (1583) five-eighths ($\frac{5}{8}$) inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

One thousand five hundred eighty-three (1583) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Two Thousand One Hundred Thirty-three and 30-100 Dollars (\$2,133.30); making in the aggregate as the contract price for such wood stave pipe, hereinbefore described, and the accessories and materials above described the sum of Thirty-five Thousand Eight Hundred Twenty-six and 49-100 Dollars (\$35,826.49).

That at the same time and as part of the same transaction, the said Slick Brothers Construction Company, Limited, also purchased from the plaintiff, Portland Wood Pipe Company, two thousand one hundred seventy-five (2175) feet of twenty (20) inch machine-banded wire-wound wood stave pipe at seventy-two cents (72c) per foot for all designed to be used under a fifty (50) foot head, and eighty-one and one-fourth cents ($81\frac{1}{4}$ c) per foot for such por-

tion of it as was designed to be used under a seventy-five (75) foot head; that the total contract price for such machine-banded wire-bound wood stave pipe, all of which was twenty (20) inches in diameter, delivered f. o. b. Crane Station, Washington County, Idaho, was One Thousand Six Hundred Sixty-seven and 18-100 Dollars (\$1,667.18); making in the aggregate as the contract price for the continuous stave pipe, first hereinbefore mentioned, and for the 2175 feet of twenty inch machine-banded wire-bound wood stave pipe, the sum of Thirty-seven Thousand Four Hundred Ninety-three and 67-100 Dollars (\$37,493.67).

XIII.

That for convenience, written contracts were entered into, bearing date the said 9th day of February, 1914, between plaintiff and the said defendant, Slick Brothers Construction Company, Limited, one of which said contracts covered the material required for the continuous stave pipe, and the other covered the machine-banded wire-bound wood stave pipe. That, in accordance with said contracts and as requested by said defendant, Slick Brothers Construction Company, Limited, from time to time plaintiff shipped and delivered to said Slick Brothers Construction Company, Limited, at Crane Station, Washington County, Idaho, all the material and supplies covered by said contracts, and hereinbefore described, which materials according to the terms of such contracts were to be paid for within thirty (30) days from the date of invoice and shipment, and if

not so paid to bear interest from said date at the rate of eight per cent. (8%) per annum; that such shipments commenced on the 14th day of February and ended on the 18th day of March, 1914, when the last of said material was shipped by plaintiff to said principal contractor and defendant, and delivered to said defendant a few days thereafter at said Crane Station, and was actually used by the said defendant Slick Brothers Construction Company, Limited, in the construction of said irrigation system, works and structures, and is now a part of such irrigation system.

XIV.

That in addition to the materials so furnished by the said plaintiff to the said defendant Slick Brothers Construction Company, Limited, as above set forth, the said plaintiff furnished at the special instance and request of said Slick Brothers Construction Company, Limited, certain other material and supplies for use in the construction of said irrigation system, works and structures, of the reasonable value of One Hundred Thirteen and 05-100 Dollars (\$113.05). That such extra supplies and materials were shipped between the 11th day of March and the 17th day of March, 1914, and were delivered to and received by the said defendant, Slick Brothers Construction Company, Limited, and were used by such defendant in the construction of said irrigation system, works and structures, and are now a part of such irrigation system.

XV.

That the said plaintiff has fully complied with all the terms and conditions of the said contracts above mentioned, by it to be kept and performed.

XVI.

That the said supplies so furnished by the said plaintiff to the said defendant, as above set forth, were of the aggregate value of Thirty-seven Thousand and Six Hundred Six and 72-100 Dollars (\$37,606.-72), no part of which has been paid except the sum of Fifteen Thousand Dollars (\$15,000) paid on or about the 17th day of April, 1914, and the further sum of Seven Thousand Six Hundred Eighty-one and 73-100 Dollars (\$7,681.73), freight charges as such supplies and materials were received, and the sum of Five Thousand Four Hundred Sixteen and 57-100 Dollars (\$5,416.57) paid on or about June 24th, 1914, leaving a balance due and unpaid of *Nine Thousand Seven Hundred Thirty-three and 94-100 Dollars* (\$9,733.94).

XVII.

That on the 9th day of May, 1914, and within sixty (60) days after the delivery of the material and supplies, above mentioned, to the said defendant Slick Brothers Construction Company, Limited, and for the purpose of perfecting a lien upon said irrigation system for the money so due said plaintiff, as above set forth, the said plaintiff filed for record in the office of the Recorder of said County of Washington, State of Idaho, its claim of lien, a copy of which

is hereto attached, marked Exhibit "A" and made a part hereof; to the contents of which exhibit your orator prays that reference may be had the same as if fully and directly set forth herein. Which claim of lien was duly verified, and was on the said 9th day of May, 1914, duly recorded in the records of said County in Book 2 of Liens at pages 83 to 88, inclusive, at thirty minutes past nine o'clock in the forenoon of said day.

XVIII.

That the said plaintiff paid to the said Recorder of Washington County, Idaho, the sum of Six and 60-100 Dollars (\$6.60) for filing and recording the said claim of lien, no part of which has been paid to the plaintiff.

XIX.

That the whole of the lands, right of way, reservoir site, water rights, water appropriations, easements, rights and franchises described in said claim of lien (Exhibit "A") are required for the convenient use of the said irrigation system and must be sold as one parcel.

XX.

Your orator further shows unto this Honorable Court that it has been compelled to, and has employed counsel for the foreclosure of said lien and the collection of the amount due it, as aforesaid, and that for the services of said counsel in foreclosing said lien the sum of Fifteen Hundred Dollars (\$1500) is a reasonable attorney's fee to be allowed herein.

XXI.

That the defendants above named own, or claim to own, or have some interest, right or estate in or to, or some lien on, the said irrigation system, rights of way, water rights and reservoir site above described, and upon which your orator claims a lien, as aforesaid. But the interests, claims or liens of said defendants are, and each of them is, subject, subsequent and subordinate to the said lien of your orator.

XXII.

That numerous liens have been filed against the said irrigation system, lands, rights of way and water rights, hereinbefore described, arising out of the construction of said irrigation system; that the amount of such liens and existing mortgages against the same aggregate, as your orator is informed and believes, upwards of One Hundred Fifty Thousand Dollars (\$150,000), and the said Crane Creek Irrigation Land & Power Company is unable to pay or discharge the same: that in order to properly preserve, protect and maintain said irrigation system, water rights, easements, rights and franchises appurtenant thereto and necessary for the use and operation thereof, and in order to protect your orator and other lien claimants having liens or mortgages on or against said irrigation system, a receiver should be appointed for said irrigation system, property, rights and franchises, with power to preserve and maintain the same pending the foreclosure of your orator's said lien and the sale of said irrigation system, lands, water rights and property hereinbefore described.

XXIII.

Your orator further shows that no proceedings at law have been had or instituted, or any other suit or action commenced, for or on behalf of your orator for the foreclosure of said lien, or the collection of the amount due your orator, as aforesaid.

In Consideration Whereof, and forasmuch as your orator is remediless in the premises according to the strict course of the common law, and can only have relief in a court of equity, your orator prays the aid of this Honorable Court, as follows:

(a) That your orator's said lien may be decreed a first and prior lien upon the irrigation system, property, rights and franchises hereinbefore described, and the whole thereof; and that your orator may have a decree foreclosing its said lien, and judgment against the said defendant Slick Brothers Construction Company, Limited, for the sum of \$9,733.-94, together with interest thereon at the rate of eight per cent. (8%) per annum from the 24th day of June, 1914, and for the sum of \$6.60 paid by your orator for recording its said lien, and for the sum of \$1500.00 attorney's fees, and costs and disbursements herein.

(b) That the usual decree may be made for the sale of said premises, hereinbefore described, according to law and the practice of this honorable court, and that the same may be sold in one parcel and as an entirety or whole and as a going concern and without redemption, to satisfy the amount so found to be due your orator; and that in case of such sale

the said defendants, and each and all of them, and all persons claiming by, through, or under them, or either of them, may be forever barred and foreclosed of and from all equity or redemption, and all claims of, in and to the said irrigation system, lands, rights of way, water rights, rights, and franchises, and every part thereof, and that the purchaser thereof be let into the immediate possession of said premises, rights and franchises so sold, and that in the event the proceeds of such sale be insufficient to satisfy and discharge the amount due your orator, as aforesaid, together with costs of suit and attorney's fees herein, your orator may have judgment for such deficiency against the defendant Slick Brothers Construction Company, Limited, and execution therefor.

(c) That a receiver be appointed for all the property covered by your orator's said lien and hereinbefore described, with full power and authority in said receiver to take immediate possession and control thereof and to preserve, protect, maintain and operate the same under the direction of this Honorable Court, and in such manner as may be deemed necessary from time to time under the circumstances of the case.

(d) That your orator may have such other and further relief in the premises as the nature of the case may require and as shall be proper and agreeable to the principles of equity and to this court.

And may it please your Honors to grant unto your orator a Writ or Writs of Subpoena and other pro-

cess directed to the Marshal of said District, commanding him to summon the defendants hereinbefore named, and each and every of them, to be and appear in this court on a certain day therein named, and under a certain penalty therein to be limited and stated, and then and there, singly and severally, to make full, true and direct answer to this bill of complaint (but not under oath, such answer under oath being expressly waived, as to each of said defendants), and to show cause, if any they have, why the prayer of this bill of complaint should not be granted according to the rules and practices of this Honorable Court, and to stand ready to perform and abide by such order, direction or decree as may be made against them in the premises, and as to your Honorable Court shall seem meet.

And your orator will ever pray, etc.

PORTLAND WOOD PIPE COMPANY,

By: Richards & Haga,

Its Solicitors.

J. H. Richards,

Oliver O. Haga,

McKeen F. Morrow,

Counsel for Plaintiff.

Residence: Boise, Idaho.

United States of America,

District of Idaho,—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says: That he is one of the solicitors for the plaintiff above named, and that nei-

ther the said plaintiff nor any of the officers thereof reside within Ada County, State of Idaho, where this affiant resides, and that this affiant makes this affidavit and verification for and on behalf of the said plaintiff; that he has read the foregoing bill of complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

OLIVER O. HAGA.

Subscribed and sworn to before me this 7th day of November, 1914.

(SEAL)

Edna L. Hice,

Notary Public in and for Ada County, Idaho.

EXHIBIT "A."

PORTLAND WOOD PIPE COM-
PANY, *Claimant,*

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, LIMITED,
CRANE CREEK IRRIGATION
LAND & POWER COMPANY,
CRANE CREEK IRRIGATION
DISTRICT and SUNNYSIDE
IRRIGATION DISTRICT.

*Notice of Intention to Hold and Claim Lien.
To Whom It May Concern:*

Notice Is Hereby Given that the claimant, Portland Wood Pipe Company, a corporation organized under the laws of the State of Oregon with its principal place of business at Portland, Oregon,

claims a lien on all the property hereinafter described and on all the interests therein and thereto of the said Slick Brothers Construction Company, Limited, Crane Creek Irrigation Land & Power Company, Crane Creek Irrigation District and Sunnyside Irrigation District.

And the said claimant, Portland Wood Pipe Company, holds and claims a lien, and hereby gives notice of its intention to hold and claim a lien, for materials furnished at the special instance and request of Slick Brothers Construction Company, Limited, the principal contractor, and used by such principal contractor in the construction of the works hereinafter described.

That the owner and reputed owner of said works is the Crane Creek Irrigation Land & Power Company, a corporation organized under the laws of the State of Idaho, with its principal place of business at Weiser, Idaho. That the said Crane Creek Irrigation District and the said Sunnyside Irrigation District are corporations, and each of them is a corporation, organized under the irrigation district laws of the State of Idaho, with their principal place of business in Washington County, said State, and own or claim to own some interest or estate in the irrigation system, works and water rights, hereinafter described, by virtue of a contract or contracts with the said Crane Creek Irrigation Land & Power Company, the terms and conditions of which are to this claimant unknown.

That the said Slick Brothers Construction Company, Limited, a corporation organized under the laws of the State of Idaho, with its principal place of business at Boise, Idaho, on or about the 2nd day of April, 1913, entered into a contract with the said Crane Creek Irrigation Land & Power Company for the construction of the irrigation system, works and structures hereinafter described, which contract was thereafter and on or about the 8th day of November, 1913, supplemented and modified by a certain other agreement between said parties relative to the construction of said works. And the said Slick Brothers Construction Company, Limited, while engaged in the construction of said irrigation system, works and structures, and on or about the 9th day of February, 1914, purchased from this claimant, Portland Wood Pipe Company, for use in the construction of said irrigation system, works and structures certain wood stave pipe and material to be used in the erection thereof, to the amount and at the prices following, to-wit:

Staves for eleven hundred and forty-five (1145) feet of twenty-four (24) inch pipe, with a finished thickness of shell of one and one-half ($1\frac{1}{2}$) inches, in accordance with the specifications, and staves for nine hundred thirty-five (935) feet of twenty-four (24) inch pipe with the same finished thickness of shell.

The necessary metal tongues of No. 12 Gauge, to be used between the butt end joints of staves.

Ninety-one hundred and fifty-six (9156) half

inch ($1\frac{1}{2}$) bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

Ninety-one hundred fifty-six (9156) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Three Thousand Forty-three and 25-100 Dollars (\$3,043.25).

Also the following material, to-wit:

Staves for eighteen hundred fifty-one (1851) feet of sixty-two (62) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inches.

The necessary metal tongues of No. 12 Gauge, to be used between butt end joints of staves.

Seventy-nine hundred eighty-one (7981) five-eighths ($\frac{5}{8}$) inch bands in two pieces, complete with nuts and washers, bands bent to form and coated prior to shipment.

Fifteen thousand nine hundred sixty-two (15,962) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Nine Thousand One Hundred and Ninety-eight Dollars (\$9,198).

Also the following material, to-wit:

Staves for seven hundred thirty (730) feet of fifty (50) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inches, and staves for twenty-one hundred seventy (2170)

feet of fifty (50) inch pipe with the same finished thickness of shell.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

Eighteen thousand seven hundred eighty-five (18,785) five-eighths ($\frac{5}{8}$) inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

Eighteen thousand seven hundred eighty-five (18,785) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Fourteen Thousand Two Hundred Nine and 34-100 Dollars (\$14,209.34).

Also the following material, to-wit:

Staves for thirty-three hundred ninety-two (3392) feet of forty-two (42) inch pipe, with a finished thickness of shell of one and five-eighths ($1\frac{5}{8}$) inches, and three hundred fifteen (315) feet of forty-two (42) inch pipe with the same thickness of shell.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

Five thousand eight hundred thirty-three (5833) half ($\frac{1}{2}$) inch bands in one piece; fifty-two hundred sixty-five (5265) five-eighths ($\frac{5}{8}$) inch bands in one piece; all complete with nuts and washers, bands bent to form and coated prior to shipment.

Five thousand eight hundred thirty-three (5833) malleable cast iron shoes to be used with

one-half ($\frac{1}{2}$) inch bands; five thousand two hundred sixty-five (5265) malleable cast iron shoes to be used with five-eighths ($\frac{5}{8}$) inch bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Seven Thousand Two Hundred Forty-two and 60-100 Dollars (\$7,242.60).

Also the following material, to-wit:

Staves for eight hundred twenty (820) feet of fifty-four (54) inch pipe with a finished thickness of shell of one and seven-eighths ($1\frac{7}{8}$) inches.

The necessary metal tongues of No. 12 Gauge to be used between the butt end joints of staves.

One thousand five hundred eighty-three (1,583) five-eighths ($\frac{5}{8}$) inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

One thousand five hundred eighty-three (1,583) malleable cast iron shoes to be used with said bands.

All to be delivered f. o. b. cars, Crane Station, Idaho, for the sum of Two Thousand One Hundred Thirty-three and 30-100 Dollars (\$2,133.30); making in the aggregate as the contract price for such wood stave pipe, hereinbefore described, and the accessories and materials above described the sum of Thirty-five Thousand Eight Hundred Twenty-six and 49-100 Dollars (\$35,826.49).

That at the same time and as part of the same transaction, the said Slick Brothers Construction

Company, Limited, also purchased from this claimant, Portland Wood Pipe Company, two thousand one hundred and seventy-five (2175) feet of twenty (20) inch machine-banded wire-wound wood stave pipe at seventy-two cents (72c) per foot for all designed to be used under a fifty (50) foot head, and eighty-one and one-fourth cents ($81\frac{1}{4}$ c) per foot for such portion of it as was designed to be used under a seventy-five (75) foot head; that the total contract price for such machine-banded wire-wound wood stave pipe, all of which was twenty (20) inches in diameter, delivered f. o. b. Crane Station, Washington County, Idaho, was One Thousand Six Hundred Sixty-seven and 18-100 Dollars (\$1,667.18); making in the aggregate as the contract price for the continuous stave pipe, first hereinbefore mentioned, and for the 2175 feet of twenty inch machine-banded wire-wound wood stave pipe the sum of Thirty-seven Thousand Four Hundred and Ninety-three and 67-100 Dollars (\$37,493.67).

That for convenience, written contracts were entered into, bearing date the said 9th day of February, 1914, between this claimant and the said Slick Brothers Construction Company, Limited, one of which said contracts covered the material required for the continuous stave pipe, and the other covered the machine-banded wire-wound wood stave pipe.

That in accordance with said contracts and as requested by said Slick Brothers Construction Company, Limited, from time to time this claimant shipped and delivered to said Slick Brothers Construc-

tion Company, Limited, at Crane Station, Washington County, Idaho, all the material and supplies covered by said contracts, and hereinbefore described; that such shipments commenced on the 14th day of February and ended on the 18th day of March, 1914, when the last of said material was shipped by this claimant to said principal contractor, and delivered to said contractor a few days thereafter at said Crane Station.

That in addition thereto this claimant furnished at the special instance and request of said principal contractor, certain other material and supplies for use in the construction of said irrigation system, works and structures, of the reasonable value of One Hundred Thirteen and 05-100 Dollars (\$113.05). That such extra supplies and material were shipped between the 11th day of March and the 17th day of March, 1914, for delivery to said principal contractor at said Crane Station, Idaho; and that all of such material, hereinbefore described or referred to, and furnished by this claimant, and for which a lien is hereby claimed on said irrigation system, works and structures, water rights and appurtenances, was received by said Slick Brothers Construction Company, Limited, and by such Company used in the construction of said irrigation system, works and structures, and is now a part of such irrigation system.

That this claimant has fully complied with all the terms of the said contract or contracts by it to be kept and performed.

That by the said contracts for the purchase of said material it was agreed that the said Slick Brothers Construction Company, Limited, should pay for said material within thirty (30) days from the date of invoice and shipment, and should pay the freight thereon, but the amount of freight charges should be credited on the purchase price upon presentation of the original receipted expense bills for such charges. That the said principal contractor paid this claimant on or about the 17th day of April, 1914, the sum of Fifteen Thousand Dollars (\$15,000) in cash to be applied on its account for the purchase of such material; and it has paid freight charges on such material to the amount of Seven Thousand Three Hundred Eighty-three and 22-100 Dollars (\$7,383.22), for which said principal contractor is entitled to credit on the purchase price. That the total credit to which said principal contractor is entitled by reason of the payments made as aforesaid is Twenty-two Thousand Three Hundred Eighty-three and 22-100 Dollars (\$22,383.22), leaving a balance due this claimant, Portland Wood Pipe Company, on account of the furnishing of such materials and supplies of Fifteen Thousand Two Hundred Twenty-three and 50-100 Dollars (\$15,223.50).

That all of such material was sold upon terms that provided that if payments were not made within thirty (30) days from date of invoice, the same should bear interest at the rate of eight per cent. (8%) per annum. And this claimant therefore claims interest upon the amount due it, as aforesaid,

to-wit: On the sum of \$15,223.50, from the 17th day of April, 1914, at eight per cent. (8%) per annum.

That the property, irrigation system, rights of way, water rights, works and structures upon which this claimant hereby claims a lien for the amount due it, with interest thereon as aforesaid, are more particularly described as follows:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir, as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the government of the United States.

(b) All canals, ditches, head gates, flumes, pipe lines, laterals and other structures, dams and works, used or intended to be used or required in connection

with the distribution of the water from said reservoir and for carrying and distributing said water to the place or places of intended use; and all rights of way therefor; and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section Seven (7), Township Eleven (11) North, Range Three (3) West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30 and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19 and 18 in Township 10 North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (N. E. $\frac{1}{4}$) of Section 23, Township 10 North, Range 5 West, B. M. Also that certain siphon and branch canal, branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (N. W. $\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23, and 22, and in a southerly and westerly direction through Sections 27, 28 and 32, Township 11 North, Range 4 West, B. M. And all branch canals, main and subordinate laterals, serv-

ice ditches, pipe lines, head gates and other structures of every kind and nature, used or intended to be used in connection with said irrigation system, or any part thereof, which said irrigation system is designed to furnish water for irrigating certain large tracts of land situated within what is known as the Sunnyside Irrigation District and the Crane Creek Irrigation District, which districts have acquired, or intended to acquire by virtue of contracts with the said Crane Creek Irrigation Land & Power Company, certain rights or interests in said irrigation system, the nature and terms of which are to this claimant unknown, but said irrigation system being constructed in part at least for the irrigation of land within said irrigation districts.

(c) Also all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures hereinbefore described, now owned or that may hereafter be acquired for use in connection with said irrigation system, works and structures, and particularly the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

Permit No. 8507, recorded Book 27, page 8507, issued Aug. 10, 1912.

It being the intention of this claimant, Portland Wood Pipe Company, to claim a lien for the sum of \$15,223.50, with interest thereon at the rate of eight per cent. (8%) per annum from the 17th day of April, 1914, upon all of said irrigation system, works and structures, water rights and rights of way therefor, whether owned by the said Crane Creek Irrigation Land & Power Company, or the said Sunnyside Irrigation District or the said Crane Creek Irrigation District, for material furnished for use in the construction of said irrigation system, as hereinbefore stated, and upon all the rights and franchises owned or held in connection with said irrigation system, water rights and rights of way.

Wherefore, the Portland Wood Pipe Company, claimant, hereby claims a lien, and hereby gives notice that it holds and claims a lien upon all of the property above described, and upon all of the appurtenances, rights and franchises thereunto appertaining, and upon the whole thereof, for the sum of \$15,223.50, together with interest thereon at the rate of eight per cent. (8%) per annum from the 17th day of April, 1914, under and by virtue of the

provisions of the statutes of Idaho relating to liens and the preferred claims of mechanics and others, in such cases made and provided.

Dated this 8th day of May, 1914.

PORTLAND WOOD PIPE COMPANY,

By Oliver O. Haga,
Its Attorney and Agent.

State of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says: That the Portland Wood Pipe Company, claimant in the foregoing notice of lien, is a corporation with its principal place of business at Portland, Oregon, and that such Company and each and all of its officers are absent from the State of Idaho; that this affiant is one of the attorneys and agent for the said Portland Wood Pipe Company for the purpose of filing this lien and collecting the amount due said Company, as aforesaid; that he has read the above and foregoing claim of lien and knows the contents thereof, and that he believes the same to be true and just;

That his information concerning said account and the furnishing of said materials has been obtained from an examination of the original contracts between the Portland Wood Pipe Company and Slick Brothers Construction Company, Limited, for the furnishing of said materials, and from an examination of the original contracts between Slick Broth-

ers Construction Company, Limited, and the said Crane Creek Irrigation Land & Power Company for the construction of said irrigation works, and from conferences with the officers of said Slick Brothers Construction Company, Limited, and the said Crane Creek Irrigation Land & Power Company and the said Portland Wood Pipe Company; that he verily believes that the statements made in said notice and claim of lien, and the facts therein set forth, and the claims therein made by the Portland Wood Pipe Company are true and just.

OLIVER O. HAGA.

Subscribed and sworn to before me this 8th day of May of May, A. D. 1914.

(SEAL)

Edna L. Hice,
Notary Public.

Endorsed:

Filed Nov. 7, 1914.

A. L. Richardson, *Clerk.*

By E. B. Yarrington, *Deputy.*

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
tion,

Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION

DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, H. H. BEGLEY, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUD F. SMITH, HENRY WHITMORE, A. T. SCHWAB, L. F. EASTON, A. L. CHENOWETH, GEO. C. CATER, J. C. TONEY, THOMAS SHERRY, and E. H. HASBROUCH,

Defendants.

The answer of the Crane Creek Irrigation District, a corporation, one of the defendants above named, to the bill of complaint exhibited by the above-named complainant.

I.

Defendant admits that the Portland Wood Pipe Company, complainant, is a corporation organized and existing under the laws of the State of Oregon and a citizen thereof.

II.

Admits that this defendant is a corporation organized and existing under the laws of the State of Idaho and a citizen of said State as hereinafter averred.

III.

Admits that the Crane Creek Irrigation Land and Power Company is a corporation organized and existing under the laws of the State of Idaho and a citizen of said State.

IV.

Admits that the Sunnyside Irrigation District is a corporation organized and existing under the laws of the State of Idaho and a citizen thereof.

V.

Admits that The Idaho National Bank is a corporation organized and existing under the laws of the United States and doing business in the State of Idaho and a citizen thereof.

VI.

Admits that the C. R. Shaw Wholesale Company is a corporation organized and existing under the laws of the State of Nevada and doing business in the State of Idaho by virtue of a compliance with the laws thereof, and a citizen of the State of Nevada.

VII.

Admits that Maney Brothers and Company is a co-partnership consisting of J. W. Maney and John Maney, and that each is a citizen and resident of the State of Oklahoma, and of H. G. Wells and E. J. Wells, and that each is a resident and citizen of the State of Idaho, and that the said co-partnership is doing business under the firm name of Maney Brothers and Company.

VII½.

Admits that the Utah Fire Clay Company is a corporation organized and existing under the laws of the State of Utah and is a citizen thereof.

VIII.

Admits that Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Beyley, James M. Magee, C. A. Smith, J. L. Smith, George F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, A. L. Chenoweth, George C. Cater, J. C. Toney, Thomas Sherry, and E. H. Hasbrouch, are each a citizen of the State of Idaho; and that L. F. Easton is a citizen and resident of the State of Wisconsin; and that G. A. Heman is a resident and citizen of the State of Missouri.

IX.

Admits that the defendants Crane Creek Irrigation District and Sunnyside Irrigation District are, and at all the times in said bill of complaint mentioned were, and now are, corporations, and that each of them was organized and is existing under the laws of the State of Idaho, and particularly under the provisions of Title XIV., Political Code, Revised Codes of Idaho, and the laws supplemental to and amendatory thereof, and that their principal places of business are at Weiser, in Washington County, Idaho, and that each of them is a citizen of said State.

X.

Admits that the matter in controversy in this suit,

exclusive of interest and costs, exceeds the sum of Three Thousand (\$3000.00) Dollars.

XI.

Admits that this defendant and the defendant Sunnyside Irrigation District are the owners of:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, head gates, flumes, pipe lines, laterals and other structures, dams and works, used or intended to be used or required in connection with the distribution of the water from said reservoir and for carrying and distributing said water to the place or places of intended use; and all rights of

way therefor; and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section Seven (7), Township Eleven (11) North, Range Three (3) West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30 and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19 and 18 in Township 10 North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (N. E. $\frac{1}{4}$) of Section 23, Township 10 North, Range 5 West, B. M. Also that certain siphon and branch canal, branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (N. W. $\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23, and 22, and in a southerly and westerly direction through Sections 27, 28, and 32, Township 11 North, Range 4 West, B. M. And all branch canals, main and subordinate laterals, service ditches, pipe lines, head gates and other structures of every kind and nature, used or intended to be used

in connection with said irrigation system, or any part thereof.

(c) And also, in connection with Sunnyside Irrigation District, all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures hereinbefore described, now owned or that may hereafter be acquired for use in connection with said irrigation system, works and structures, and particularly the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

And defendant denies that Permit No. 8507 as recorded in Book 27, page 8507 and issued August 10, 1912, was acquired for, or used in connection with the said irrigation system and reservoir system, works or structures.

XII.

Defendant denies that at all the times in said bill of complaint mentioned the defendant Crane Creek Irrigation Land and Power Company was the owner or reputed owner, of the irrigation system, works and water rights situate in Washington County, Idaho, in said bill of complaint and hereinbefore in this answer mentioned and described, and denies that the said Crane Creek Irrigation Land and Power Company at the time of the filing of complainant's alleged lien, to-wit: on the 9th day of May, A. D. 1914, or at any time since, or now, the Crane Creek Irrigation Land and Power Company was the owner or reputed owner of said system, works, or water rights, or any part thereof, excepting only thirty and four-tenths (30.4) per centum of the said system, works and water rights lying outside of the boundaries of this defendant and of the Sunnyside Irrigation District.

XIII.

Defendant admits that the defendant Slick Brothers Construction Company, Limited, on or about the second day of April, 1913, entered into a contract in writing with the said defendant Crane Creek Irrigation Land and Power Company for the construction of the irrigation system, works, and structures in the bill of complaint and hereinbefore described, and that said contract was on or about the 8th day of November, 1913, supplemented and modified by a certain other agreement between the said parties relative to the construction of said works; that the said construction Company, pursuant to said con-

tracts, entered upon the construction of the said works and while so engaged in such construction and on or about the 9th day of February, 1914, it purchased from the complainant, Portland Wood Pipe Company, for use in the construction of said irrigation system, works and structures certain wood stave pipe material to be used in the erection thereof in the quantity and at the prices specifically set forth in the complainant's bill of complaint; and admits that at the same time and as a part of the same transaction the said construction Company purchased from the said complainant in quantity and at the prices in said bill of complaint specified certain twenty-inch machine-banded wire-wound wood stave pipe; and that all of said material was of the value or contract price in the aggregate of Thirty-seven Thousand Four Hundred Ninety-three and Sixty-seven One-hundredths (\$37,493.67) Dollars.

XIV.

Defendant admits the allegations of the paragraph XIII. of said bill of complaint, that written contracts of said date the 9th day of February, 1914, covering the material and prices aforesaid, were entered into by the said construction Company and the said complainant, and that all of said material was delivered to the said construction Company and was used by said Company in the construction of said irrigation system and structures.

XV.

Defendant admits that the said complainant also

furnished to the said construction Company other material and supplies for use in the construction of said irrigation system, works and structures of the reasonable value of One Hundred Thirteen and Five One-hundredths (\$113.05) Dollars, which were delivered to the construction Company between the 11th and 17th days of March, A. D. 1914, and were used in the construction of said system and works.

XVI.

As to the allegations of paragraph XV. of said bill of complaint that the complainant has fully complied with all the terms and conditions of the said contracts in the said bill of complaint mentioned, by it to be kept and performed, this defendant has no knowledge and is unable to admit or deny the same.

XVII.

Admits that there is a balance due and unpaid the complainant of Nine Thousand Five Hundred Eight and Forty-two One-hundredths (\$9,508.42) Dollars.

XVIII.

This defendant admits that on the 9th day of May, A. D. 1914, and within sixty days after the delivery of the material and supplies, hereinbefore admitted, to the Slick Brothers Construction Company, Limited, the complainant filed for record in the office of the County Recorder of Washington County, Idaho, a pretended claim of lien, and a copy thereof is attached to the bill of complaint marked "Exhibit A;" that said pretended claim of lien was verified and was recorded on said day in the records of said Coun-

ty in Book 2 of liens at page 83 to page 88 inclusive, at thirty minutes past nine o'clock in the forenoon of said day; and that complainant paid the recorder of said County the sum of Six and Sixty One-hundredths (\$6.60) Dollars for filing and recording the same.

XIX.

Admits that the whole of the lands, right of way, reservoir site, water rights, water appropriations, easements, rights and franchises described in said pretended claim of lien are required for the convenient use of the said irrigation system; but defendant denies that the same must be sold as one parcel or at all.

XX.

Defendant denies that the complainant has been compelled to employ counsel for the foreclosure of said pretended lien or for the collection of the amount due as aforesaid, and denies that Fifteen Hundred (\$1500.00) Dollars or any other sum of money is a necessary or reasonable attorneys' fees for the foreclosing of said pretended lien, or that complainant is entitled to any counsel fee whatever for the collection by suit or otherwise of the said sums herein admitted to be due.

XXI.

Defendant admits that it owns and claims to own and has an interest, right and estate in and to the irrigation system, right of way, water rights, and

reservoir site in said bill of complaint and hereinbefore in this answer described; and defendant denies that its interest is in anywise subject, subsequent, or subordinate to the said pretended claim of lien of the complainant.

XXII.

This defendant admits that some pretended claims of lien have been filed against its irrigation system, lands, and rights of way, and water rights alleged to have arisen out of the construction of the said system, but as to the amounts thereof the defendant has no knowledge sufficient to enable it to deny or admit the same; and this defendant upon its information and belief denies that the said Crane Creek Irrigation Land and Power Company is unable to pay or discharge its indebtedness as represented by said pretended claims of lien, and denies that in order to properly preserve, protect or maintain said system, water rights, easements, rights and franchises appurtenant thereto and necessary to the use and operation thereof, or to protect the said claimant or other pretended lien claimants, a receiver should be appointed for said system, property, rights and franchises, and denies that the said irrigation system, property, rights and franchises can be administered by a receiver.

XXIII.

Further answering the said bill of complaint this defendant alleges:

That it is and during all the times hereinbefore and hereinafter mentioned was a public corporation organized and existing as an irrigation district under and by virtue of the laws of the State of Idaho and particularly under the provisions of Title XIV. Political Code, Revised Codes of Idaho and the laws supplemental and amendatory thereof, for the purposes of supplying that portion of the public owning, occupying, using, or cultivating lands within its boundaries with water from the public streams and public unappropriated waters for household, domestic, and irrigating purposes and the cultivation of lands, and that its irrigation system, works, reservoir sites and water rights, as described in the bill of complaint herein and in this answer, during all of the times in said bill of complaint and this answer mentioned here and now are dedicated to a public use as aforesaid; that this defendant has hereinbefore issued its bonds in the par value of Two Hundred Forty-six Thousand Nine Hundred (\$246,900.-00) Dollars, in the aggregate, which said bonds have been sold and distributed to numbers of individuals and corporations in different states, and which said bonds are by force of the laws of Idaho charged as a first lien upon this defendant's irrigation system, works, water rights, and reservoir sites; that on the 31st day of August, A. D. 1911, the board of directors of this defendant filed its petition in the District Court in and for the County of Washington of the State of Idaho, for a confirmation of the proceedings by which defendant was organized as an irrigation

district and thereafter such proceedings were had; that a judgment of said Court was entered as follows, to-wit: "that all acts and things done and performed by the board of County Commissioners in the organization of said District, and all acts and things done and performed by said District and its board of directors from the filing of the petition for the organization of said District up to the date of the filing of the petition for confirmation thereof, were and are legal and valid and are by the Court approved and confirmed;" and thereupon an appeal was taken from said judgment of confirmation to the Supreme Court of the State of Idaho, which Court on the second day of January, A. D. 1912, entered its judgment affirming the judgment of the court below.

And this defendant, Crane Creek Irrigation District, alleges that no lien for material or otherwise furnished to the Slick Brothers Construction Company, Limited, by the complainant herein, is given by the laws of the State of Idaho, and that the pretended claim of lien set up and asserted by the complainant in its bill of complaint herein is without authority of law and of no force and effect.

Wherefore, having fully answered this defendant prays that the pretended claim of lien asserted by the complainant herein against the property of this defendant be denied; that complainant take nothing by its said bill against this defendant or its property; and that this bill be dismissed as against this defendant; and that defendant have and recover its

reasonable costs and charges in this behalf wrongfully incurred.

CRANE CREEK IRRIGATION DISTRICT.

By Chas. C. Cleary,
President.

Ed. R. Coulter, Weiser,
C. S. Varian, Salt Lake City, Utah,
Solicitors for
Crane Creek Irrigation District.

Service with copy admitted this 3rd day of February, A. D. 1915.

Richards & Haga,
Solicitors for Complainant.

*In the District Court of the United States, District
of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY,

Plaintiff,

VS.

SLICK BROTHERS CONSTRUCTION COM-
PANY, Ltd., a corporation, et al.,

Defendants.

In Equity No. 511.

*Amendment to Answer of Crane Creek Irrigation
District to Bill of Complaint.*

The defendant Crane Creek Irrigation District by leave of Court first had and obtained, makes the following amendment to its answer to the Bill of Complaint by striking from the first two lines of paragraph 11 of said answer, the following:

“Admits that this defendant and the defendant Crane Creek Irrigation District are the owners of” and inserting in lieu thereof:

“This defendant denies that the Crane Creek Irrigation Land and Power Company during all or any of the times mentioned in said bill, was or still is the owner or reputed owner of the lands, irrigation system, works or water rights described in paragraph 11 of said Bill of Complaint, but, on the contrary, this defendant alleges that said Crane Creek Irrigation Land and Power Company, this defendant and defendant Crane Creek Irrigation District during all of said times were and still are the owners of”.

CRANE CREEK IRRIGATION DISTRICT,

(Corporate Seal) By Daisy Dash,
Secretary.

ED R. COULTER,
C. S. VARIAN,

Solicitors for Crane Creek Irrigation District.

Endorsed: Filed Feb. 3, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK

IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, H. H. BEGLEY, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUD F. SMITH, HENRY WHITMORE, A. T. SCHWAB, L. F. EASTON, A. L. CHENOWETH, GEO. C. CATER, J. C. TONEY, THOMAS SHERRY, and E. H. HASBROUCH,

Defendants.

The answer of the Sunnyside Irrigation District, a corporation, one of the defendants above named, to the bill of complaint exhibited by the above-named complainant.

I.

Defendant admits that the Portland Wood Pipe Company, complainant, is a corporation organized and existing under the laws of the State of Oregon and a citizen thereof.

II.

Admits that this defendant is a corporation organized and existing under the laws of the State of Idaho and a citizen of said State as hereinafter averred.

III.

Admits that the Crane Creek Irrigation Land and Power Company is a corporation organized and existing under the laws of the State of Idaho and a citizen of said State.

IV.

Admits that the Sunnyside Irrigation District is a corporation organized and existing under the laws of the State of Idaho and a citizen thereof.

V.

Admits that The Idaho National Bank is a corporation organized and existing under the laws of the United States and doing business in the State of Idaho and a citizen thereof.

VI.

Admits that the C. R. Shaw Wholesale Company is a corporation organized and existing under the laws of the State of Nevada and doing business in the State of Idaho by virtue of a compliance with the laws thereof, and a citizen of the State of Nevada.

VII.

Admits that Maney Brothers and Company is a co-partnership consisting of J. W. Maney and John Maney, and that each is a citizen and resident of the State of Oklahoma, and of H. G. Wells and E. J. Wells, and that each is a resident and citizen of the State of Idaho, and that the said co-partnership is doing business under the firm name of Maney Brothers and Company.

VII½.

Admits that the Utah Fire Clay Company is a corporation organized and existing under the laws of the State of Utah and is a citizen thereof.

VIII.

Admits that Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Beyley, James M. Magee, C. A. Smith, J. L. Smith, George F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, A. L. Chenoweth, George C. Cater, J. C. Toney, Thomas Sherry, and E. H. Hasbrouch, are each a citizen of the State of Idaho; and that L. F. Easton is a citizen and resident of the State of Wisconsin; and that G. A. Heman is a resident and citizen of the State of Missouri.

IX.

Admits that the defendants Crane Creek Irrigation District and Sunnyside Irrigation District are, and at all the times in said bill of complaint mentioned were, and now are, corporations, and that each of them was organized and is existing under the laws of the State of Idaho, and particularly under the provisions of Title XIV., Political Code, Revised Codes of Idaho, and the laws supplemental to and amendatory thereof, and that their principal places of business are at Weiser, in Washington County, Idaho, and that each of them is a citizen of said State.

X.

Admits that the matter in controversy in this suit,

exclusive of interest and costs, exceeds the sum of Three Thousand (\$3000.00) Dollars.

XI.

Admits that this defendant and the defendant, Crane Creek Irrigation District, are the owners of:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, head gates, flumes, pipe lines, laterals and other structures, dams and works, used or intended to be used or required in connection with the distribution of the water from said reservoir and for carrying and distributing said water to

the place or places of intended use; and all rights of way therefor; and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section Seven (7), Township Eleven (11) North, Range Three (3) West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30 and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19 and 18 in Township 10 North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (N. E. $\frac{1}{4}$) of Section 23, Township 10 North, Range 5 West, B. M. Also that certain siphon and branch canal, branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (N. W. $\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23, and 22, and in a southerly and westerly direction through Sections 27, 28, and 32, Township 11 North, Range 4 West, B. M. And all branch canals, main and subordinate laterals, service ditches, pipe lines, head gates and other struc-

tures of every kind and nature, used or intended to be used in connection with said irrigation system, or any part thereof.

(c) And, also, in connection with Crane Creek Irrigation District, all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures hereinbefore described, now owned or that may hereafter be acquired for use in connection with said irrigation system, works and structures, and particularly the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

And defendant denies that Permit No. 8507 as recorded in Book 27, page 8507 and issued August 10, 1912, was acquired for, or used in connection with the said irrigation system and reservoir system, works or structures.

XII.

Defendant denies that at all the times in said bill of complaint mentioned the defendant Crane Creek Irrigation Land and Power Company was the owner, or reputed owner, of the irrigation system, works and water rights situate in Washington County, Idaho, in said bill of complaint and hereinbefore in this answer mentioned and described, and denies that the said Crane Creek Irrigation Land and Power Company at the time of the filing of complainant's alleged lien, to-wit, on the 9th day of May, A. D. 1914, or at any time since, or now, the Crane Creek Irrigation Land and Power Company was the owner or reputed owner of said system, works, or water rights, or any part thereof, excepting only thirty and four tenths (30.4) per centum of the said system, works and water rights lying outside of the boundaries of this defendant and of the Sunnyside Irrigation District.

XIII.

Defendant admits that the defendant Slick Brothers Construction Company, Limited, on or about the second day of April, 1913, entered into a contract in writing with the said defendant Crane Creek Irrigation Land and Power Company for the construction of the irrigation system, works, and structures in the bill of complaint and hereinbefore described, and that said contract was on or about the 8th day of November, 1913, supplemented and modified by a certain other agreement between the said parties

relative to the construction of said works; that the said construction Company, pursuant to said contracts entered upon the construction of the said works and while so engaged in such construction and on or about the 9th day of February, 1914, it purchased from the complainant, Portland Wood Pipe Company, for use in the construction of said irrigation system, works and structures certain wood stave pipe material to be used in the erection thereof in the quantity and at the prices specifically set forth in the complainant's bill of complaint; and admits that at the same time and as a part of the same transaction the said construction Company purchased from the said complainant in quantity and at the prices in said bill of complaint specified certain twenty-inch machine-banded wire-wound wood stave pipe; and that all of said material was of the value or contract price in the aggregate of Thirty-seven Thousand Four Hundred Ninety-three and Sixty-seven One-hundredths (\$37,493.67) Dollars.

XIV.

Defendant admits the allegations of the paragraph XIII. of said bill of complaint, that written contracts of said date the 9th day of February, 1914, covering the material and prices aforesaid, were entered into by the said construction Company and the said complainant, and that all of said material was delivered to the said construction Company and was used by said Company in the construction of said irrigation system and structures.

XV.

Defendant admits that the said complainant also furnished to the said construction Company other material and supplies for use in the construction of said irrigation system, works and structures of the reasonable value of One Hundred Thirteen and Five One-hundredths (\$113.05) Dollars, which were delivered to the construction Company between the 11th and 17th days of March, A. D. 1914, and were used in the construction of said system and works.

XVI.

As to the allegations of paragraph XV. of said bill of complaint that the complainant has fully complied with all the terms and conditions of the said contracts in the said bill of complaint mentioned, by it to be kept and performed, this defendant has no knowledge and is unable to admit or deny the same.

XVII.

Admits that there is a balance due and unpaid the complainant of Nine Thousand Five Hundred Eight and Forty-two One-hundredths (\$9,508.42) Dollars.

XVIII.

This defendant admits that on the 9th day of May, A. D. 1914, and within sixty days after the delivery of the material and supplies, hereinbefore admitted, to the Slick Brothers Construction Company, Limited, the complainant filed for record in the office of the County Recorder of Washington County, Idaho, a pretended claim of lien, and a copy thereof is attached to the bill of complaint marked "Exhibit A;"

that said pretended claim of lien was verified and was recorded on said day in the records of said County in Book 2 of liens at page 83 to page 88 inclusive, at thirty minutes past nine o'clock in the forenoon of said day; and that complainant paid the recorder of said County the sum of six and sixty one-hundredths (\$6.60) Dollars for filing and recording the same.

XIX.

Admits that the whole of the lands, right of way, reservoir site, water rights, water appropriations, easements, rights and franchises described in said pretended claim of lien are required for the convenient use of the said irrigation system; but defendant denies that the same must be sold as one parcel or at all.

XX.

Defendant denies that the complainant has been compelled to employ counsel for the foreclosure of said pretended lien or for the collection of the amount due as aforesaid, and denies that fifteen hundred (\$1500.00) Dollars or any other sum of money is a necessary or reasonable attorney's fee for the foreclosing of said pretended lien, or that complainant is entitled to any counsel fee whatever for the collection by suit or otherwise of the said sums herein admitted to be due.

XXI.

Defendant admits that it owns and claims to own and has an interest, right and estate in and to the

irrigation system, right of way, water rights, and reservoir site in said bill of complaint and hereinbefore in this answer described; and defendant denies that its interest is in anywise subject, subsequent, or subordinate to the said pretended claim of lien of the complainant.

XXII.

This defendant admits that some pretended claims of lien have been filed against its irrigation system, lands, and rights of way, and water rights alleged to have arisen out of the construction of the said system, but as to the amounts thereof the defendant has no knowledge sufficient to enable it to deny or admit the same; and this defendant upon its information and belief denies that the said Crane Creek Irrigation Land and Power Company is unable to pay or discharge its indebtedness as represented by said pretended claims of lien, and denies that in order to properly preserve, protect or maintain said system, water rights, easements, rights and franchises appurtenant thereto and necessary to the use and operation thereof, or to protect the said complainant or other pretended lien claimants, a receiver should be appointed for said system, property, rights and franchises, and denies that the said irrigation system, property, rights and franchises can be administered by a receiver.

XXIII.

Further answering the said bill of complaint this defendant alleges:

That it is and during all the times hereinbefore and hereinafter mentioned was a public corporation organized and existing as an irrigation district under and by virtue of the laws of the State of Idaho and particularly under the provisions of Title XIV., Political Code, Revised Codes of Idaho, and the laws supplemental and amendatory thereof, for the purposes of supplying that portion of the public owning, occupying, using, or cultivating lands within its boundaries with water from the public streams and public unappropriated waters for household, domestic, and irrigating purposes, and the cultivation of lands, and that its irrigation system, works, reservoir sites and water rights, as described in the bill of complaint herein and in this answer, during all the times in said bill of complaint and in this answer mentioned were and now are dedicated to a public use as aforesaid; that this defendant has hereinbefore issued its bonds in the par value of Five Hundred Thirty-seven Thousand and Eight Hundred (\$537,800.00) Dollars, in the aggregate, which said bonds have been sold and distributed to numbers of individuals and corporations in different states, and which said bonds are by force of the laws of Idaho charged as a first lien upon this defendant's irrigation system, works, water rights, and reservoir sites; that on the 31st day of August, A. D. 1911, the board of directors of this defendant filed its petition in the District Court in and for the County of Washington of the State of Idaho, for a confirmation of the proceedings by which defendant was organized as an

irrigation district and thereafter such proceedings were had; that a judgment of said Court was entered as follows, to-wit: "that all acts and things done and performed by the board of County Commissioners in the organization of said District, and all acts and things done and performed by said District and its board of directors from the filing of the petition for the organization of said District up to the date of the filing of the petition for confirmation thereof, were and are legal and valid and are by the Court approved and confirmed;" and thereupon an appeal was taken from said judgment of confirmation to the Supreme Court of the State of Idaho, which Court on the second day of January, A. D. 1912, entered its judgment affirming the judgment of the court below.

And this defendant, Sunnyside Irrigation District, alleges that no lien for material or otherwise furnished to the Slick Brothers Construction Company, Limited, by the complainant herein, is given by the laws of the State of Idaho, and that the pretended claim of lien set up and asserted by the complainant in its bill of complaint herein is without authority of law and of no force and effect.

Wherefore, having fully answered this defendant prays that the pretended claim of lien asserted by the complainant herein against the property of this defendant be denied; that complainant take nothing by its said bill against this defendant or its property; and that this bill be dismissed as against this defendant; and that defendant have and recover its reason-

able costs and charges in this behalf wrongfully incurred.

SUNNYSIDE IRRIGATION DISTRICT,

By August Brockman,

President.

ED. R. COULTER, Weiser,

N. M. RUICK, Boise,

C. S. VARIAN, Salt Lake City, Utah,

Solicitors for

Sunnyside Irrigation District.

Service with copy admitted this 3rd day of February, A. D. 1915.

RICHARDS & HAGA,

Solicitors for Complainant.

*In the District Court of the United States, District
of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY,

Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Ltd., a corporation, et al.,

Defendants.

In Equity, No. 511.

Amendment to answer of Sunnyside Irrigation District to Bill of Complaint.

The defendant Sunnyside Irrigation District by leave of Court first had and obtained, makes the following amendment to its answer to the Bill of Complaint, by striking from the first two lines of paragraph 11 of said answer, the following:

“Admits that this defendant and the defendant Crane Creek Irrigation District are the owners of” and inserting in lieu thereof:

“This defendant denies that the Crane Creek Irrigation Land and Power Company during all or any of the times mentioned in said bill, was or still is the owner or reputed owner of the lands, irrigation system, works or water rights described in paragraph 11 of said Bill of Complaint, but, on the contrary, this defendant alleges that said Crane Creek Irrigation Land and Power Company, this defendant and defendant Crane Creek Irrigation District during all of said times were and still are the owners of”.

SUNNYSIDE IRRIGATION DISTRICT,

By Ed. R. Coulter,

(Corporate Seal)

Secretary.

ED. R. COULTER,

C. S. VARIAN,

Solicitors for Sunnyside Irr. Dist.

Endorsed: Filed Feb. 3, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
tion,

Plaintiff,

v.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a

corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, et al.,

Defendants,

And

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation,

Cross-Complainant,

v.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, et al.,

Cross-Defendants,

And

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells),

Cross-Complainant,

v.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, et al.,

Cross-Defendants.

In Equity, No. 511.

Statement of Evidence by and for Crane Creek Irrigation District and Sunnyside Irrigation District, Defendants.

E. R. Coulter, a witness for the Crane Creek Irrigation District and the Sunnyside Irrigation District, testified as follows:

That he was a practicing attorney living at Weiser, Idaho, and was the secretary of the Sunnyside

Irrigation District and had the custody of all the records of said district; that he had been the attorney for the Sunnyside Irrigation District and the Crane Creek Irrigation District since their organization, and that he organized the districts and was familiar with all of their transactions from their inception to the present time; that Exhibit "B" was the original contract entered into at the date therein mentioned by the Crane Creek Irrigation Land & Power Company and the Sunnyside Irrigation District; that Exhibit "N" was a contract between the Crane Creek Irrigation Land & Power Company and the Sunnyside Irrigation District for an extension of time when the Crane Creek Irrigation Land & Power Company should give the indemnity bond called for by the contract marked Exhibit "B;" that Exhibit "O" was the contract dated April 19, 1913, between the same parties for an extension of time for completion of the system, or for certain portions thereof; that the first issue of bonds of the Sunnyside Irrigation District was of date January 1, 1910, and that there were 550 of said bonds of the total par value of \$415,000; that the next issue of bonds was of July 1, 1911, being 208 of the par value of \$150,000.00, all of the Sunnyside District and the aggregate value thereof being \$565,000.00; that no other bonds for the Sunnyside Irrigation District have since been issued.

It was stipulated in open Court by and between the solicitors for the plaintiff and the solicitors for the Crane Creek and Sunnyside Irrigation Districts that the contracts in evidence hereinbefore referred to

were identical with the contracts made with the Crane Creek Irrigation District by the Crane Creek Irrigation Land & Power Company with the exception that there was a difference in the respective contracts in the matter of the interests the said districts severally had in the property to be constructed and conveyed.

Resuming, the witness further testified:

That the original contracts,—contract “B,” and the similar contract with the Crane Creek Irrigation District, contemplated an interest in the system and reservoir in proportion to the amount of acreage of land in the two districts. Since the execution of those contracts on August 22, 1910, additional acreage of land has been taken into each of the districts, and the percentages, as called for in that contract are not the correct percentages at this date;

On cross-examination, the witness further testified:

That with relation to the percentages of the bonds delivered by the districts the same were as follows, namely: Where the construction work was in common for the two districts it was paid for by the two districts in the proportion of 32% and 68%,—32% by the Crane Creek Irrigation District and 68% by the Sunnyside Irrigation District,—and where the work was not in common,—that is, where it was work entirely within one irrigation district,—that irrigation district paid for the work in its entirety.

The dates and amounts of bonds delivered by each district were as follows:

April 13, 1913, Sunnyside Irrigation District delivered to Crane Creek Irrigation Land & Power Company \$151,000 of bonds, and on the same date the Crane Creek Irrigation District delivered to the same corporation \$99,000 of bonds, all at par value. This was the first delivery. At that time each of the districts received an estimate of the amount of work that had been done in the construction of the reservoir. A form of deed, according to the witness's recollection, was presented at that time but not formally delivered until a short time after. The deliveries were based in part upon the estimates furnished by the engineers of the cost of the reservoir. \$51,000 of bonds of the Sunnyside Irrigation District were for construction work on the reservoir and \$100,000 of bonds were delivered on the execution and delivery of the indemnity bond called for by the terms of the contract. The Crane Creek Irrigation Land & Power Company delivered to the two districts a joint and several bond for the fulfillment of those two contracts of August 22, 1910, signed by the Aetna Accident & Liability Company of Hartford, Connecticut. Of the \$99,000 of bonds delivered by the Crane Creek Irrigation District, \$75,000 was delivered on the execution of this indemnity bond and the difference between \$75,000 and \$99,000 was delivered on the estimate of the engineers on the construction of the reservoir. The total amount of bonds delivered on account of the indemnity bond was \$175,000. The next delivery was made on June 13, 1913, on which day the Sunnyside Irrigation District delivered \$21,000 in bonds and the Crane Creek District

delivered \$5,000 in bonds,—both deliveries based on the monthly estimates of the engineers; the next delivery was on July 18, 1913,—by the Sunnyside District \$28,000 and by the Crane Creek District \$45,000,—both deliveries based on the monthly estimates of the engineers; the next delivery was on September 17, 1913,—\$48,700 by the Sunnyside District and \$18,500 by the Crane Creek District, both deliveries based on the estimates of the engineers; the next delivery was on December 11, 1913. Here the witness said:

“Now, an explanation occurs here. One of the exhibits there shows a contract of date October 16, 1913, executed between all of these parties, the two districts and the Crane Creek Irrigation Land & Power Company, whereby all the remaining bonds were placed in escrow with the First National Bank of Weiser. The Crane Creek Company had obtained a syndicate of bankers at Kansas City and Pittsburg who had agreed to take the whole issue at sixty cents on the dollar, and, for convenience, and to meet with the demands of that syndicate, all the bonds were escrowed with the bank, and with the agreement that as the monthly estimates came in from the engineers and were allowed by the districts and were approved by the districts, that the districts would, in lieu of the actual delivery of bonds to the Crane Creek Irrigation Land & Power Company, give them orders upon this bank, trustee, to pay the money proceeds of the bonds, or if they had not been sold, in lieu of the proceeds, to pay them the bonds direct; and this

contract was again subsequently changed by the contract of November 21, 1913, which is also one of the exhibits here, and under this contract the trustee was changed from the First National Bank of Weiser to the Commerce Trust Company of Kansas City, Missouri, under the same terms and conditions. So the estimate of December 11, 1913,—there were two estimates allowed and approved at that date—and on December 11, 1913, the Sunnyside Irrigation District gave to the Crane Creek Irrigation Land & Power Company an order on the Commerce Trust Company of Kansas City to pay to the Irrigation Land & Power Company the proceeds of \$38,300 of the coupon bonds at par value under that contract of November 21, 1913.”

Proceeding, the witness testified as follows:

On the same date it (Sunnyside District) gave another order to the same party on the Commerce Trust Company for the sale proceeds of \$19,964 of bonds and on the same date the Crane Creek District gave similar orders to the Irrigation Land & Power Company on the Commerce Trust Company, one for \$16,623 and the other for \$2,838, both orders based upon the monthly estimates of the engineers; that there were no deliveries between September 17th and December 11th, 1913; that during this time Mr. Ford and Mr. Slick and others had gone back east to make arrangements to get the bonds sold; that the next delivery was made on January 10, 1914, when the Sunnyside District delivered an order for the proceeds of \$27,842 and the Crane Creek District de-

livered an order for the proceeds of \$5,253; on the same basis as before—sixty cents on the dollar; the next delivery was made February 4, 1914, by the Sunnyside District \$12,963.66, and by the Crane Creek District for \$5,031.08 in bonds; these bonds were also held in escrow by the Commerce Trust Company under an escrow agreement between the irrigation districts and the Crane Creek Irrigation Land & Power Company and were delivered upon the engineers' estimates to pay the proceeds of so many dollars of bonds. Here the witness said that he had copies of all of those orders and receipts if they were desired. Resuming, he testified as follows:

The next delivery was made on March 3, 1914 by the Sunnyside District \$31,235, and by the Crane Creek District \$13,230, each being for the proceeds of that much of the bonds at par value; that the procedure was the same as upon the previous deliveries. That the next delivery was on April 1, 1914, by the Sunnyside District for the proceeds of \$69,390 of the bonds, and by the Crane Creek District for the proceeds of \$32,650 of the bonds; that the next delivery was on May 5, 1914, by the Sunnyside District for the proceeds of \$33,335 and by the Crane Creek District for the proceeds of \$26,675. That on June 6, 1914, the Sunnyside District delivered \$49,100 and the Crane Creek District delivered \$15,700, based on the engineers' estimates, and the proceeds were delivered by the escrow holders; on December 28, 1914, the delivery was, by the Sunnyside District \$7,000 and by the Crane Creek District \$2,000, the procedure being the same as heretofore explained; before

this delivery the Commerce Trust Company had returned to the First National Bank of Weiser all the bonds that had not been sold, but they still held the balance of cash on hand belonging to the districts, and this last order, as I recall it, was given in duplicate,—that is it was given to the two banks as trustees, but the procedure was the same. That was for an estimate that had never been presented to the Board—it was not presented until December. All of the bonds of the two districts have not yet been delivered. The Crane Creek Irrigation District still has on hand and undelivered \$9,017.62 of bonds at par, and the Sunnyside District has \$27,170.24 that have not been delivered. These bonds are covered by these contracts. That is, they are held by the districts under the provisions of those contracts of August 22, 1910, as amended; when the Crane Creek Irrigation Land & Power Company shall have completed its contracts they will be entitled to the delivery of the remainder of those bonds.

On redirect examination the witness testified:

The delay in the delivery of the bonds was because the Power Company did not call for them and present the estimates; Exhibit "T" of date January 3, 1911, in relation to extending the time for delivery of bonds is an original paper.

Edwin D. Ford, a witness for the Crane Creek and Sunnyside Irrigation Districts, testified as follows:

That he was the president of the Crane Creek Irrigation Land & Power Company; that from the be-

ginning he was looking after the work for the said Land & Power Company and its business with the districts and the construction company; that at the time of the execution of the original contract of August 22, 1910, between the Crane Creek Irrigation Land & Power Company and the irrigation districts, referring to the recital in the contract aforesaid, the Crane Creek Irrigation Land & Power Company was the owner of a partially completed irrigation system, that the said company had actually completed nothing but had acquired a right-of-way and reservoir site; it owned the reservoir site and certain rights to waters and water appropriations; that part of the Sunnyside canal or ditch belonged to that company but nothing had been done on their reservoir; that it owned the land of the reservoir site, and some rights-of-way and water permits. A series of deeds from the Crane Creek Irrigation Land & Power Company to the Crane Creek Irrigation District, numbered from 1 to 13 inclusive, and from the Crane Creek Irrigation Land & Power Company to the Sunnyside Irrigation District, numbered from 1 to 13 inclusive, purporting to convey from time to time certain percentages of interest in the constructed work to the said districts, were received in evidence.

Resuming, the witness testified:

That the final percentages of interest in the system used in common were, Sunnyside District 47.2%, and the Crane Creek District 22.4%, and the laterals and canals within those districts belonged wholly to the districts.

Attached to and made a part of this statement, of the case, are the Exhibits as follows: Plaintiff's Exhibits Nos. 1-A and 1-B, 37, 38, 39; also the attached Abstracts of 13 deeds executed by Crane Creek Irrigation Land & Power Company to Sunnyside Irrigation District, and 13 deeds executed and delivered by the Crane Creek Irrigation Land & Power Company to the Crane Creek District. No one of which deeds was ever recorded excepting the two deeds dated May 29, 1913, which were recorded on November 19, 1914.

Evidence was introduced by the Plaintiff tending to establish all the facts alleged in the bill of complaint.

The foregoing is all the evidence material or relevant to the issues between the plaintiff and the irrigation districts defendants.

C. S. VARIAN,
E. R. COULTER,

Solicitors for Sunnyside and Crane Creek Irrigation Districts.

Service with copy admitted this 8th day of July, 1915.

RICHARDS & HAGA,
Solicitors for Plaintiff.

The above and foregoing statement of evidence is hereby duly settled, allowed, signed and made a part of the record in this action this 17th day of July, 1915.

FRANK S. DIETRICH,
District Judge.

STIPULATION.

It is hereby stipulated and agreed by and between the Portland Wood Pipe Company, plaintiff above named and the Crane Creek Irrigation District and the Sunnyside Irrigation District, defendants, through their representative solicitors, that all original exhibits introduced in the above entitled cause may, with the consent of the Court be transmitted to the clerk of the United States Circuit of Appeals for the Ninth Circuit before the hearing of the cause in said Court and the same may be used upon the argument or the hearing of said cause in said Court, and shall be considered as part of the record on the hearing therein as fully and to the same extent as if transcribed and printed in the record, and appellants shall have the right, and they shall do so if requested by appellees and if it be deemed necessary by the Court to print as part of the record on appeal any exhibits or any other part of the record or of the evidence taken in said cause not included in the statement, this day settled and allowed.

Dated this 17th day of July, 1915.

RICHARDS & HAGA,

Solicitors for Plaintiff.

C. S. VARIAN and

E. R. COULTER,

*Solicitors for Defendants, Crane Creek and
Sunnyside Irrigation Districts.*

Approved: Frank S. Dietrich, District Judge.

PLAINTIFF'S EXHIBITS NO. 1-A & 1-B.

This Contract, entered into the 9th day of February, 1914, by and between the Portland Wood Pipe Company, a corporation organized under the laws of the State of Oregon, hereinafter known as "Pipe Company," and the Slick Brothers Construction Company, Limited, a corporation organized under the laws of the State of Idaho, hereinafter known as "Construction Company," which contract shall be binding not only upon the parties hereto, but their successors and assigns: whereas,

The said Construction Company is about to install a pipe line for the carrying of water on the project and lands of the Crane Creek Irrigation Land & Power Company, at or near Crane Station in the County of Washington, State of Idaho, and desires to purchase from the said Pipe Company approximately twenty-one hundred and seventy-five (2175) feet of twenty (20) inch machine banded wire wound wood stave pipe for the purpose, said pipe to be delivered f. o. b. cars Crane Station, Idaho, in accordance with the conditions hereinafter named:

Now, therefore, the said Pipe Company agrees to furnish said twenty (20) inch pipe under the following conditions, to-wit:

The material entering into the construction of said pipe, and the method of manufacture, to be in accordance with the specifications attached hereto.

Twenty (20) inch pipe, fifty (50) foot head, three (3) inch spacing, Number two (2) wire, one and three-eighths ($1\frac{3}{8}$) inch shell, individual band coup-

lings, at the price of seventy-two cents (72c) per foot, f. o. b. cars, Crane Station, Idaho.

Twenty (20) inch pipe, seventy-five (75) foot head, two (2) inch spacing, Number two (2) wire, one and three-eighths ($1\frac{3}{8}$) inch shell, individual band couplings, at the price of eighty-one and one-quarter cents ($81\frac{1}{4}$ c) per foot, f. o. b. Crane Station, Idaho.

The said Construction Company agrees to pay for said pipe at the price above named, and to furnish the order for said pipe so that the Pipe Company may take advantage of car load shipments in makings shipments of said pipe; said Construction Company is to give said Pipe Company ten (10) days notice prior to the time that shipment of the pipe is expected to be made from Portland, Oregon; the said Pipe Company is to begin shipments of said pipe from Portland, Oregon, within ten (10) days after receipt of said notice, and to furnish said pipe at the rate of at least one (1) car per each working day until order is completed:

Crane Station, Idaho, is a prepay station and the Construction Company agrees to make arrangements with the railroad company so that freight charges may be paid at Weiser, Idaho, on arrival of shipments, and thus prevent the necessity of prepayment of freight charges before shipment goes forward from Portland, and the said Construction Company agrees to furnish the said Pipe Company with a copy of the authority of the railroad company to permit

such shipments to go forward without prepayment of freight charges;

The said Construction Company agrees to receive the pipe, pay the freight charges, and take same from cars immediately upon arrival of the cars and within the free time permitted by the rules of the railroad company, and if such cars are not unloaded within the free time that they will pay any demurrage charges that may accrue on account of their failure to remove said pipe from said cars.

The Construction Company agrees to inspect said pipe within three days of the time of its arrival at Crane Station, Idaho, and to report immediately and furnish proper affidavits for any damage or shortage of pipe in said cars, and if possible to have railroads agent's notation upon the original expense bill, as to damage or shortage;

The said Construction Company agrees to pay for said pipe at the prices named, and within thirty (30) days of the date of invoice and shipment of each car load of said pipe;

The said Pipe Company agrees to credit the account of the said Construction Company with the amount of freight charges paid upon presentation of the original receipted expense bill for such charges;

The said Construction Company agrees that the said Pipe Company shall not be held responsible for any delays caused by strikes, floods, or any other causes beyond their control;

In Witness Whereof, The parties hereto have caused these presents to be duly executed by the pro-

perly constituted officers who have authority so to do,
on the day and year first above written.

PORTLAND WOOD PIPE COMPANY,

By F. M. Baum, General Manager.

SLICK BROTHERS CONSTRUCTION CO., Ltd.

By W. B. Slick, President.

I, A. J. Wiley, acting as consulting engineer for
the Crane Creek Irrigation Land & Power Company,
have examined the foregoing contract and the same
meets with my approval.

.....day of....., 1914.

.....
*Consulting Engineer for Crane Creek
Irr. Land & Power Co.*

Endorsed: Filed, March 25, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

SPECIFICATIONS.

For Machine Banded Wire Wound Wood Stave Pipe.

All pipe to be furnished under these specifications
shall be wire wound wood stave pipe of first class
quality complying with the following specification.

Stave. The Staves shall be cut from first class
yellow or Douglas fir, thoroughly kiln dried before
being milled, and it shall be perfectly sound, straight-
grained, entirely free from knots, dry rot, pitch
seams, wind shakes, cracks, or any defects that will
impair the strength or durability of the pipe. Sap
wood penetrating more than one-half inch into the
inner surface of the stave shall not be permitted.

Small, tight knots less than $\frac{3}{4}$ inch in diameter, will be permitted, providing they do not run through the staves at any point, and pitch pockets will be allowed, provided they do not exceed 3 inches in length or $\frac{1}{2}$ inch in depth. No pitch seams or knots of any description will be allowed on the edges or sides of the staves.

The finished thickness of the staves shall be $1\frac{3}{8}$ inches and the staves shall be milled from stock of ample width and thickness to insure full finished dimensions and good true surfaces and edges. The sides of the staves shall be dressed to the proper inside and outside circumference of the pipe and the edges to true radial lines.

Wire. All pipe shall be wound with double galvanized steel wire of suitable size and spacing for the various heads. The steel in the wire shall have a tensile strength of 60,000 lbs. per square inch and shall show an elongation in 8 inches before breaking, of 20% and shall be capable of bending cold 180 degrees without signs of fracture.

The size and spacing shall be such that the wire has at all points a factor of safety not less than 4 against the strain produced by water pressure plus a lateral pressure per square inch between the staves equal to one and one-half times the water pressure. The initial tension put in the wire as it is wound upon the pipe shall be $\frac{3}{4}$ of its tensile strength, and it shall be wound in such manner as to give a uniform strain in the wire at all points on each length of pipe.

Couplings. The couplings shall be of the wood sleeve type, with individual bands of proper size and number to suit the bands. The bands for couplings shall be provided with the same factor of safety and the steel in these shall comply with the same specifications as are given above for the pipe. The ends of the pipe shall be properly headed to fit snugly in the sleeve couplings.

Dipping. The outside surface of all pipe and all couplings shall be thoroughly dipped in a bath of hot tar and asphalt of proper mixture. Care shall be taken in dipping to protect the tenon ends of the pipe and the inside of the coupling so as to leave these smooth for securing a tight fit at the joints, after dipping, the pipe shall be rolled through a bed of sawdust, to provide a protective covering over the tar and asphalt coating.

This Contract, Entered into on the 9th day of February, 1914, by and between the Portland Wood Pipe Company, a corporation organized under the laws of the State of Oregon, hereinafter known as the "Pipe Company" and the Slick Bros. Construction Company, Limited, a corporation organized under the laws of the State of Idaho, hereinafter known as "Construction Company," which contract shall be binding not only upon the parties hereto, but their successors and assigns; Whereas,

The said Construction Company is about to install continuous stave pipe lines of twenty-four (24)

inches, sixty-two (62) inches, fifty (50) inches, forty-two (42) inches and fifty-four (54) inches in diameter, for the purpose of carrying water on the project and the lands of the Crane Creek Irrigation Land & Power Company, at or near Crane Station, in the County of Washington, State of Idaho, and desires to purchase from the said Pipe Company the material to be used in said pipe construction in accordance with the conditions hereinafter named;

Now, therefore, the same Pipe Company agrees to furnish the material hereinafter stated on the following conditions, to-wit:

Staves for eleven hundred and forty-five (1145) feet of twenty-four (24) inch pipe, with a finished thickness of shell of one and one-half ($1\frac{1}{2}$) inches in accordance with the specifications in Exhibit No. 1 attached hereto, and staves for nine hundred thirty-five (935) feet of twenty-four (24) inch pipe with the same finished thickness of shell, in accordance with specifications as shown in Exhibit No. 2 attached hereto;

The necessary metal tongues of No. 12 gauge, to be used between the butt end joints of staves;

Ninety-one hundred and fifty-six (9156) ($\frac{1}{2}$) inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment.

Ninety-one hundred fifty-six (9156) malleable cast iron shoes to be used with said bands;

All f. o. b. cars, Crane Station, Idaho, for the sum of Thirty Hundred Forty-three (\$3043.25) Dollars and Twenty-five Cents.

Staves for eighteen hundred fifty-one (1851) feet of sixty-two (62) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inch; in accordance with the specifications in Exhibit No. 1 attached hereto;

The necessary metal tongues of No. 12 gauge to be used between butt end joints of staves;

Seventy-nine hundred eighty-one (7981) five-eighths ($\frac{5}{8}$) inch bands in two pieces, complete with nuts and washers, bands bent to form and coated prior to shipment;

Fifteen thousand nine hundred sixty-two (15,962) malleable cast iron shoes to be used with said bands;

All f. o. b. cars, Crane Station, Idaho, for the sum of Ninety-one Hundred Ninety-eight Dollars (\$9198).

Staves for seven hundred thirty (730) feet of fifty (50) inch pipe, with a finished thickness of shell of two and one-eighth ($2\frac{1}{8}$) inches, in accordance with the specifications in Exhibit No. 1 attached hereto, and staves for twenty-one hundred seventy (2170) feet of fifty (50) inch pipe with the same finished thickness of shell in accordance with specifications in Exhibit No. 2 attached hereto.

The necessary metal tongues of No. 12 gauge to be used between the butt end joints of staves;

Eighteen thousand seven hundred eighty-five (18,785) five-eighths ($\frac{5}{8}$) inch bands in one piece, complete with nuts and washers, bands bent to form and coated prior to shipment;

Eighteen thousand seven hundred eighty-five (18,785) malleable cast iron shoes to be used with said bands;

All f. o. b. cars Crane Station, Idaho, for the sum of Fourteen Thousand Two Hundred and Nine Dollars and Thirty-four Cents (\$14,209.34).

Staves for thirty-three hundred ninety-two (3392) feet of forty-two (42) inch pipe, with a finished thickness of shell of one and five-eighths ($1\frac{5}{8}$) inches, in accordance with the specifications in Exhibit No. 1 attached hereto, and three hundred fifteen (315) feet of forty-two (42) inch pipe with the same thickness of shell in accordance with specifications in Exhibit No. 2 attached hereto;

The necessary metal tongues of No. 12 gauge to be used between the butt end joints of staves;

Fifty-eight hundred thirty-three (5833) half ($\frac{1}{2}$) inch bands in one piece;

Fifty-two hundred sixty-five (5265) five-eighths ($\frac{5}{8}$) inch bands in one piece; all complete with nuts and washers, bands bent to form and coated prior to shipment;

Fifty-eight hundred thirty-three (5833) malleable cast iron shoes to be used with one-half ($\frac{5}{8}$) inch bands;

Fifty-two hundred sixty-five (5265) malle-

able cast iron shoes to be used with five-eighths ($\frac{5}{8}$) inch bands;

All f. o. b. cars Crane Station, Idaho, for the sum of Seven Thousand Two Hundred and Forty-two Dollars and Sixty Cents (\$7,242.60).

Staves for eight hundred twenty (820) feet of fifty-four (54) inch pipe with a finished thickness of shell of one inch and seven-eighths ($\frac{17}{8}$) inches; in accordance with the specifications in Exhibit No. 1 attached hereto;

The necessary metal tongues of No. 12 gauge to be used between the butt end joints of staves;

Fifteen hundred eighty-three (1583) malleable cast iron shoes to be used with said bands;

All f. o. b. cars Crane Station, Idaho, for the sum of Twenty-one Hundred and Thirty-three Dollars and Thirty Cents (\$2,133.30).

The steel bands in the above mentioned material, as well as the malleable cast iron shoes, to be in accordance with specifications included in Exhibit No. 1 attached hereto.

The said Construction Company agrees to pay for said material at the prices above named, and to furnish the order for said material so the Pipe Company may take advantage of carload shipments in making shipments of said material;

Crane Station, Idaho, is a prepay station and the Construction Company agrees to make arrangements with the railroad company so that freight charges may be paid at Weiser, Idaho, on arrival of ship-

ments, and thus prevent the necessity of prepayment of freight charges before shipment goes forward from the different shipping points, and the said Construction Company agrees to furnish the said Pipe Company with a copy of the authority of the railroad company to permit such shipments to go forward without prepayment of freight charges;

The said Construction Company agrees to receive the said material, pay freight charges, and take same from cars immediately upon arrival of the cars, and within the free time permitted by the rules of the railroad company, and if such cars are not unloaded within the free time that they will pay any demurrage charges that may accrue on account of their failure to remove said material from said cars.

The Construction Company agrees to inspect said material within five (5) days of the time of its arrival at Crane Station, Idaho, and to report immediately and furnish proper affidavits for any damage or shortage of material in said cars, and if possible to have railroad agents notation upon the original expense bill as to damage or shortage;

The said Construction Company agrees to pay for said material at the prices named and within thirty (30) days of the date of invoice and shipment of each shipment of said material;

The said Pipe Company agrees to credit the account of the said Construction Company with the amount of freight charges paid upon presentation of the original receipted expense bill for such charges;

The said Construction Company agrees that the said Pipe Company shall not be held responsible for any delays caused by strikes, floods, or any other causes beyond their control; that shipments shall start at once and last shipment to be forwarded in time to arrive at Crane Station by April 10, 1914. Subject to delay beyond Pipe Company's control.

In Witness Whereof, The parties hereto have caused these presents to be duly executed by the properly constituted officers who have authority so to do, on the day and year first above written.

PORTLAND WOOD PIPE COMPANY,

By F. M. Baum,

General Manager.

SLICK BROS. CONSTRUCTION CO., Ltd.,

By W. B. Slick,

President.

I, A. J. Wiley, acting as Consulting Engineer for The Crane Creek Irrigation, Land & Power Company, have examined the foregoing contract and the same meets with my approval.

9th day of February, 1915.

A. J. WILEY,

Consulting Engineer for the Crane Creek Irrigation, Land & Power Company.

PORTLAND WOOD PIPE COMPANY
SPECIFICATIONS

For Continuous Stave Wood Pipe Material.

Staves. Staves shall be made of live timber known

as Oregon or Douglas Fir, sound, straight-grained, entirely free of all deadwood, rotten knots, dry rot, shakes, cracks, or any other imperfections or defects that might impair its strength or durability.

Pitch seams not extending more than one-quarter ($\frac{1}{4}$) of the way through the thickness of the stave will be allowed. Small tight sound knots not over three-quarters ($\frac{3}{4}$) of an inch in diameter not penetrating through thickness of stave and not occurring oftener than one in four feet of stave will be allowed. Sap on the inside of the staves and not extending more than three-quarters ($\frac{3}{4}$) of an inch in thickness will be allowed. No pitch seams or knots of any description will be allowed upon edges or sides of the staves.

All timber used must be thoroughly seasoned by either air or kiln drying before being milled into staves.

The staves shall be dressed on both sides to true circles of the inside and outside diameter of the pipe and the edges shall be dressed to conform to the radial lines of the pipe.

All staves shall be of uniform thickness, and each stave shall be of uniform width throughout its entire length, the staves may vary in length from twelve to thirty-two feet, but not more than ten per cent (10%) shall be twelve feet (12), and not more than twenty per cent (20%) shall be fourteen feet (14), and less in length.

The ends of the staves shall be cut square with the side and shall be fitted with the sawkerf for the in-

section of a metal tongue of wrought iron or steel plate No. 12 B. W. G. The size of the kerf shall be of such dimension as to make the tongue fit tight in all directions and shall be cut across the ends of the stave in exactly the same position.

The sawkerf in the end of the staves shall be one sixteenth (1-16) of an inch less in depth than one-half of the width of the metal tongue to be inserted into the stave.

The steel or wrought iron metal tongues shall be one and one-half inches ($1\frac{1}{2}$) wide, measured with the length of the pipe, and in length shall be one-eighth ($\frac{1}{8}$) of an inch longer than the width of the sawkerf across the end of the stave so that when the tongue in place it will project one-sixteenth (1-16) of an inch into the adjoining staves.

STEEL BANDS:

Manufacture. Steel shall be made by the Open Hearth.

Chemical Composition. Open Hearth Steel; Phosphorus shall not exceed 06.

Ultimate Strength. The ultimate strength shall be from 55,000 to 65,000 lbs. per square inch.

Yield Point. The yield point shall be not less than one-half of the ultimate strength and shall be determined by the drop of the beam of the testing machine.

Elongation. A minimum per cent in eight (8) inches of 1,400,000 divided by the ultimate tensile strength.

Modification in Elongation. For bands less than 7-16 and more than $\frac{3}{4}$ inches in diameter, the following modifications shall be made:

(a) For each increase of $\frac{1}{8}$ inch in diameter above $\frac{3}{4}$ inch, a deduction of 1 shall be made from the specified percentage of elongation.

(b) For each decrease of 1-16 inch in diameter below 7-16 inch, a deduction of 1 shall be made from the specified percentage of elongation.

Bend. The rods or bands shall be capable of bending 180 degrees around a diameter equal to the diameter of the specimen tested without fracture on either side.

Finish. Bands must be free from any injurious seams, flaws, or cracks, and have a workmanlike finish.

Where one-piece bands are used the bands shall be provided with a button head on one end, and the other end to be provided with five inches of cold rolled thread of United States Standard Gauge.

Where two-piece bands are used, the bands shall be made in two pieces, one piece to be provided with a button head on each end, and the other piece to be provided with not less than five inches (5) of cold rolled thread of the United States Standard Gauge on each end.

Each threaded end shall be provided with a hexagonal nut one-sixteenth (1-16) of an inch thicker than the diameter of the band. Each threaded end shall also be provided with one place washer of the proper diameter and standard thickness.

The nuts shall fit the thread of the band in such manner as to turn easily and shall give the full bearing on all of the threads of the nut.

The threads shall be of such strength as to insure that the band will break in the body or shank before breaking in the threads.

Shoes. The shoes to connect the ends of the rods shall be of malleable cast iron of the most tenacious character, such as will stand a great amount of hammering without fractures, and shall have a tensile strength of not less than forty thousand (40,000) pounds to the square inch of section. They shall be sound, smooth castings of the size and form as required for the purpose, and shall be well adapted to receive the strain induced by clinching of the bands.

Coating. All steel bands and malleable cast iron shoes shall be thoroughly coated prior to shipment with manufacturers' standard protective coating.

CRANE CREEK IRRIGATION, LAND & POWER
COMPANY—CRANE CREEK PRO-
JECT, IDAHO

Specifications for Wood Stave Pipe Line.

All pipe to be furnished under these specifications shall be continuous wood stave pipe of first-class quality complying with the following detailed specifications:

Staves. The staves shall be cut from first-class yellow, or Douglas, fir, thoroughly kiln dried before being milled, and it shall be perfectly sound, straight

grained, entirely free from knots, dry rot, pitch seams, wind shakes, cracks, or any defects that will impair the strength or durability of the pipe. Sap wood penetrating more than one-half inch into the inner surface of the stave shall not be permitted. No pitch seams or knots of any description will be allowed on the edges or sides of the staves.

On all parts of the pipe where the head is over 200 feet, the lumber used in the staves shall be perfectly clear, sound lumber, free from knots, pitch seams, or pockets, or imperfections of any description, and it shall have either vertical or bastard grain.

The sides of the staves shall be dressed to the proper inside and outside circumference of the pipe and the edges to true radial lines. No staves shall be used longer than thirty (30) or shorter than ten (10) feet, and not over ten (10) per cent shall be less than twelve (12) feet in length.

The ends of the staves shall be sawed off square and accurately slotted for a 12 Gauge tongue, the slots to be of such thickness as will provide a close fit for the tongue.

Endorsed: Filed March 25, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

PLAINTIFF'S EXHIBIT NO. 38.

Supplemental Agreement.

This Supplemental Agreement, made and entered into this 2nd day of April, A. D. 1913, by and between Slick Brothers Construction Company,

Limited, a corporation duly organized and existing under the laws of the State of Idaho (hereinafter called the "Constructor"), the party of the first part, and Crane Creek Irrigation Land & Power Company, a corporation duly organized and existing under the laws of the State of Idaho, the party of the second part, witnesseth, that:

Whereas, the parties hereto have this day entered into a contract for the construction and completion of the canals, dams, aqueducts, ditches, pipe lines, tunnels, flumes and other structures and irrigation works for the party of the second part, described therein and being the same work described in those two certain contracts in writing, each dated the 22nd day of August, 1910, by and between the party of the second part hereto and the Crane Creek Irrigation District and the Sunnyside Irrigation District;

Now, therefore, for and in consideration of the payments and agreements in said contract and in this contract hereinafter set forth, to be paid, kept and performed, it is further agreed between the parties hereto as follows, to-wit:

First. That the said contract first above referred to, and to which this agreement is supplemental, was entered into by and between the parties hereto with the understanding that the following is the amount of work of the various kinds specified still to be performed:

70,000 cu. yds. of earth in dam to be removed.

600,000 cu. yds. of earth to be removed in other structure.

- 10,000 cu. yds. of loose rock to be removed.
- 20,000 cu. yds. of solid rock to be removed.
- 3,000 cu. yds. of rip rap to be placed.
- 1,080 cu. yds. of core wall to be placed.
- 530 lineal feet of tunnel to be excavated.
- 6,800 lineal feet of 44-inch pipe.
- 2,900 lineal feet of 48-inch pipe.
- 1,050 lineal feet of 66-inch pipe.
- 800 lineal feet of 24-inch pipe.
- 1,500 lineal feet of 20-inch pipe.
- 2,725,000 board feet of lumber to be placed.

And accordingly, it is hereby covenanted and agreed that the price hereinbefore specified to be paid unto the Contractor shall be increased or diminished in accordance with changes in the amount, dimensions or character of the work to be done or materials to be furnished in accordance with the following schedule:

Excavation in earth dam.....	35c per cu. yd.
Excavation in earth elsewhere.....	15c per cu. yd.
Excavation in loose rock.....	40c per cu. yd.
Excavation in solid rock.....	\$1.20 per cu. yd.
Rip rap	\$2.00 per cu. yd.
Core wall	\$11.00 per cu. yd.
Tunnels	\$6.00 per lineal ft.
44-inch pipe	\$3.50 per lineal ft.
48-inch pipe	\$3.50 per lineal ft.
66-inch pipe	\$6.00 per lineal ft.
24-inch pipe	\$1.25 per lineal ft.
20-inch pipe	\$1.25 per lineal ft.
Lumber.....	\$30.00 per 100 bd. ft.

The party of the second part shall have the right to make such changes in the amount, dimension or character of the work to be done or materials to be furnished as in the opinion of the Chief Engineer the interests of said work or of the said party of the second part may require. But in the event the amount of work to be done and materials to be furnished by the Contractor under its said agreement for the construction of said irrigation works, exceeds the estimate above set forth, the Crane Creek Irrigation Land & Power Company shall pay for such excess at the rates above specified, such payment to be made within sixty days after the final estimate has been made; and in case the amount of work to be done and materials to be furnished by the Contractor under this agreement is less than the estimate above set forth, the Contractor shall pay the Crane Creek Irrigation Land & Power Company for the difference in amount between said estimate and the work and materials furnished, at the rates above specified.

Second. It is further agreed that all work done under said contract shall be classified upon the above basis for the purpose of arriving at each monthly estimate by A. J. Wiley, of Boise, Idaho, chief engineer for the party of the second part, or his successor in office, and payments shall only be made in accordance with the classification made by said chief engineer, which classification shall be final and conclusive upon the parties hereto.

Third. It is further understood and agreed that this agreement shall, as to the rights and interests of

J. S. and W. S. Kuhn, Incorporated, the purchasers of the bonds of said irrigation districts, have no force or effect, it being particularly agreed that they shall be held harmless by both parties hereto for any and all expenditures above the lump sum of three hundred seventy thousand Dollars (\$370,000.00) for or on account of the construction of said irrigation works. The Contractor hereby specially agrees to waive any and all liens upon the irrigation works constructed, or any part or portion thereof, for any and all sums above the lump sum above mentioned, and that in case, under the provisions of this contract, the cost of the work should exceed said sum that no lien for such excess shall ever be filed.

In Witness Whereof, the parties hereto, by authority of their respective Boards of Directors, have caused their names to be hereunto subscribed by their respective officers, and their respective corporate seals affixed, in duplicate, the day and year first above written.

SLICK BROTHERS CONSTRUCTION

COMPANY, Ltd.,

By W. B. Slick, President.

Attest: Frank B. Cross, Secretary.

CRANE CREEK IRRIGATION

LAND & POWER CO.,

By E. D. Ford, President.

Attest: E. P. Hall, Secretary.

Endorsed: Filed March 25, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

CONTRACT.

This Agreement, made and entered into this 2nd day of April, A. D. 1913, by and between Slick Brothers Construction Company, Limited, a corporation duly organized and existing under the laws of the State of Idaho, hereinafter called the "Contractor," party of the first part, and Crane Creek Irrigation Land & Power Company, a corporation duly organized and existing under the laws of the State of Idaho, the party of the second part;

Witnesseth: That the parties hereto for and in consideration of the payments, covenants and agreements hereinafter set forth, to be paid, kept and performed, have mutually covenanted and agreed for themselves, their successors and assigns as follows:

First. The contractor shall construct and complete all the canals, dams, aqueducts, ditches, pipe lines, tunnels, flumes and other structures and irrigation work of the party of the second part hereto as particularly set forth and described in the plans and specifications thereof, hereto attached, marked "Exhibit A," and made a part hereof, being the same work described in those two certain contracts in writing, each dated the 22nd day of August, 1910, by and between the party of the second part hereto and the Crane Creek Irrigation District and the Sunnyside Irrigation District, copies of each of which said contracts and Contractor hereby acknowledges to have received and read prior to the signing of this agreement, including the completion in all respects of the dam for said irrigation system now partially constructed, to

the full height of sixty-four (64) feet, and shall furnish all material necessary for the construction and completion of said irrigation work, and shall construct and complete the same in a workmanlike and substantial manner to the satisfaction and approval of A. J. Wiley of Boise, Idaho, the Chief Engineer of the party of the second part hereto.

Second. The Contractor shall commence the work hereinbefore described and set forth in the plans and specifications hereto attached on or before the 21st day of April, 1913, and shall fully complete the same on or before the first day of January, 1914.

Third. The Contractor shall perform the work hereinbefore described and shall not sublet or transfer the same, or any portion thereof, without the written consent of the Chief Engineer of the party of the second part hereto, and the written consent of said Chief Engineer shall not release the Contractor from any obligation to the party of the second part hereto or to the persons so employed by the sub-contractors, and in all cases the sub-contractors shall be considered merely as foremen employed by the Contractor and liable to be discharged for incompetence, neglect of duty or misconduct.

Fourth. The performance of the work shall be under the direction and supervision of the Engineer of the party of the second part for the time being in charge, who shall have the right to reject and condemn any or all of the work which in his opinion does not conform to the plans and specifications hereto attached (subject, however, to the final approval of the

Chief Engineer), and all such imperfect or insufficient work or material shall be immediately remedied by the Contractor at the Contractor's sole cost and expense and to the satisfaction of the Engineer; provided, however, that the Contractor shall be under no obligation to remedy or change any work or material which it believes to conform to the plans and specifications hereto attached, unless or until it shall have received written notice from the Chief Engineer to the effect that said work or material are not in accordance with the plans and specifications hereto attached.

Fifth. The party of the second part shall pay or cause to be paid to the Contractor, its successors or assigns, for the construction and completion of the work hereinbefore described, as set forth in the plans and specifications hereto attached and marked Exhibit "A," the sum of Three Hundred Seventy Thousand (\$370,000) Dollars, lawful money of the United States of America, payable monthly in installments equal to the approximate estimate of the Engineer of the party of the second part hereto, approved by its Chief Engineer.

Sixth. Approximate estimates of the value of the work done or material furnished for the preceding month on the basis of the unit prices hereinafter specified shall be made on or about the first day of each month by the Engineer of the party of the second part in charge of the work, subject to the approval of the Chief Engineer, and the amount of said estimate shall be paid to the Contractor on or before the

15th day of said month. The balance due on the final estimate shall be paid by the party of the second part unto the Contractor within sixty days after the completion of the work upon certificate of the Chief Engineer that the whole work provided for in this agreement has been acceptably completed within the time specified, and the Contractor shall before said final payment is made, sign and deliver to the party of the second part a valid release and discharge of and from all claims and demands whatsoever, based upon the provisions of this contract.

Seventh. The Chief Engineer in preparing his final estimate and giving his final certificate need not be bound by the preceding estimates and certificates, which shall be held to be only approximate and in no case shall be taken as an acceptance of the work or a release of the Contractor for responsibility therefor until the final estimate is made and the work in its entirety is accepted as complete under this agreement.

Eighth. The Contractor agrees to prosecute the work diligently to completion and if the said Contractor shall fail to prosecute the work with a force sufficient in the opinion of the Chief Engineer to insure its completion within the time specified in this agreement or if the character of the work is not in accordance with the plans and specifications hereto attached, the Chief Engineer may serve written notice on the Contractor to at once supply such increases of force, appliances or tools, or to cause such improvement in the character of the work or materials as may

be required to make the same conform to the stipulations of this agreement, plans and specifications; and if at the expiration of ten days after the service of such written notice upon the Contractor personally, or by leaving the same at the Contractor's office or last known place of business, the Contractor shall have failed to comply with such notice, the Chief Engineer shall have full power to take charge of the work and to direct the employment of such additional force of men, teams, tools and equipment as he may deem requisite and necessary to complete the work in the time specified, to pay all persons so employed and all expenses incurred and to use the tools, teams and equipment of the party of the first part (he being authorized to take possession thereof) and to deduct the amount so paid from any payments then due or thereafter falling due to the Contractor, or in case of failure of the Contractor to prosecute the work as aforesaid, the Chief Engineer may, upon the expiration of ten days after such notice has been served, declare said agreement forfeited and abandoned, which declaration shall absolve the party of the second part from all obligations under or in any wise growing out of this agreement, excepting the obligation to make payments of all amounts then due to the Contractor. In case the Contractor shall fail to complete the said work within the time specified, but shall, nevertheless be permitted to complete the same, such permission shall not release the Contractor from any liability for damages or expenses arising from the non-comple-

tion of the work in the time specified, but such liability shall continue in full force against the Contractor the same as if such permission had never been granted.

Ninth. In the event that the work is materially delayed by the failure of the Engineer to stake out the work promptly, or in securing right of way from any cause for which the party of the second part is responsible, then the time specified herein for the completion of the work shall be extended for a period equal to not less than the aggregate length of time of such stoppage or delays and the Contractor shall have no further claim therefor, or from anything arising from said delays, providing the aggregate thereof is not in excess of thirty days. Such delay and extension shall not release the sureties under this agreement.

Tenth. It is understood and agreed that the party of the second part is to obtain the funds for the payment of the contractor under a contract of even date herewith from the sale of irrigation District Bonds to J. S. and W. S. Kuhn, Incorporated, of Pittsburg, Pennsylvania. In the event that the party of the second part shall be unable to obtain the necessary funds to make said payments or for any reason cannot secure the delivery of the bonds provided for in said contract, the party of the second part shall have the right to stop the work herein contracted for, or any portion thereof, or to diminish the force thereon, and the Contractor shall have no claim for damages by reason thereof. The order to stop said work or

to diminish such force shall be made in writing, signed by the party of the second part and delivered to the contractor on the work, and shall also be sent by registered mail to the contractor's office or last known place of address at least fifteen days before such order shall take effect.

Eleventh. The Contractor shall be subject to the laws of the State of Idaho regarding liens for labor and material furnished for said work, and shall protect and indemnify said party of the second part against all claims and liens against the work for labor or material furnished said Contractor; and before the final settlement is made between said parties for work done and material furnished under this agreement, the Contractor shall furnish satisfactory evidence to the party of the second part that the said dam, canals, aqueducts, flumes, pipe lines, ditches, and other structures and irrigation works are free and clear from all liens for labor, workmanship or material, and that no claim then exists in respect to which such liens could attach.

Twelfth. It is hereby stipulated and agreed that the party of the second part may deduct from each monthly estimate of the party of the first part the engineering charges of the party of the second part incurred on said work from and after the date of this agreement.

Thirteenth. It is further covenanted and agreed that the Contractor shall be responsible for all damages arising from accidents or neglect of the Contractor or its workmen in the Construction of said

irrigation work and system, and that the party of the first part will save the party of the second part harmless by reason of any such damages arising after the execution of this agreement.

Fourteenth. The plans and specifications referred to in this agreement shall be attached hereto on or before the 17th day of April, 1913, and shall be identified by the signatures of the respective Presidents of the parties thereto; said plans and specifications shall provide, inter alia, that all inlets and outlets to main canals, main flumes and main laterals, all bridges and culverts for public highways, the diversion dam at the head of the flume, all headgates for the same and all pressure boxes for the ends of siphons shall be included in this contract, and shall specify that said headgates at diversion dam shall be set in concrete, that there shall be concrete footings under all trestles and concrete pressure boxes at the end of all siphons. This also includes bridges over Weiser River to carry pipe, and that the Chief Engineer of the party of the second part hereto shall have the right to require that all tunnels, or any portions thereof, shall be lined on the bottom and not exceeding three (3) feet up the sides with concrete, if in his judgment the character of the ground is such that the construction will not be safe unless said tunnels or portions thereof be so lined with concrete.

Fifteenth. The Chief Engineer of the party of the second part hereto is hereby constituted the sole arbitrator of all matters in dispute and to deter-

mine the same between the parties hereto in respect to the work done, the classification of material and the materials furnished in the performance of this agreement and his certificate as to any such matter in dispute which may arise between the parties hereto may be final and conclusive between them and no right of action shall exist in favor of the Contractor, or its assigns, excepting for amounts shown to be due unto it until a final certificate of the Chief Engineer is made. Such final certificate shall be made in duplicate, one of which shall be delivered to each of the parties hereto.

Sixteenth. In case Mr. A. J. Wiley shall hereafter cease to act as Chief Engineer as hereinbefore specified, then J. S. and W. S. Kuhn, Incorporated, shall have the right to appoint his successor in office and such successor shall do any and all acts in the place and stead of A. J. Wiley.

Seventeenth. In case contracts are made with sub-contractors, in which a classification basis is used for the purpose of determining the compensation due to such sub-contractor, then all such contracts shall be in writing and a copy thereof filed with the party of the second part, and all such contracts shall contain a clause that the classification made by the engineer in charge, or by the Chief Engineer shall be final and conclusive upon such sub-contractor, and that no payment shall be made to him except in accordance with the classification made by the engineer in charge or by the Chief Engineer.

Eighteenth. In case the Chief Engineer, acting under paragraph eighth of this agreement, shall take charge of said work and employ the necessary forces therefor under the authority given in said paragraph, then his decision as to the necessity of such action shall be final and conclusive upon the parties hereto.

Nineteenth. For the purpose of enabling the engineer of the party of the second part, or the Chief Engineer, to make approximate estimates of the value of the work done or material furnished for the preceding month in order that monthly payments may be made, said estimates shall be made according to progress upon the basis of the following unit prices:

Excavation in earth dam.....	\$0.35 per cu. yd.
Excavation in earth elsewhere....	.15 per cu. yd.
Excavation in loose rock.....	.40 per cu. yd.
Excavation in solid rock.....	1.25 per cu. yd.
Rip-rap	2.00 per cu. yd.
Core wall	11.00 per cu. yd.
Tunnels.....	6.00 per lineal ft.
44-inch pipe.....	3.50 per lineal ft.
48-inch pipe.....	3.50 per lineal ft.
66-inch pipe.....	6.00 per lineal ft.
24-inch pipe.....	1.25 per lineal ft.
20-inch pipe.....	1.25 per lineal ft.
Lumber.....	30.00 per 1000 bd. ft.

Twentieth. The party of the second part shall have the right to make such changes in the amount, dimensions or character of the work to be done, or

materials to be furnished, as in the opinion of the Chief Engineer, the interests of said work or of the said party of the second part may require, such changes, however, to be those which, in the opinion of the Chief Engineer, are called for in order to provide good construction and an efficient irrigation system, but the lump sum hereinbefore provided shall be a full payment for all work done of every kind and character under the terms of this contract.

Twenty-first. This agreement on the part of the contractor to construct the works for the lump sum herein specified is made for the use and benefit of J. S. and W. S. Kuhn, Incorporated (a corporation), the purchaser of the bonds, as well as for the benefit of second party, and may be enforced by said corporation in its own name and on its own behalf if desired.

Twenty-second. The party of the first part shall on or before the 21st day of April, 1913, and before commencing the work contemplated in this agreement, furnish the party of the second part with a surety bond executed by a Surety Company satisfactory to the party of the first part hereto in the penal sum of One Hundred Thousand (\$100,000) Dollars, conditioned for the faithful performance of all the agreements, covenants and conditions of this agreement.

In Witness Whereof, the respective parties have caused their corporate names to be hereunto subscribed and these presents to be executed by their respective Presidents, duly attested by their respec-

tive Secretaries, and sealed with their corporate seals, all on the day and year in this agreement as above written.

SLICK BROTHERS CONSTRUCTION
COMPANY, Ltd.,

By W. B. Slick, President.

Attest: Frank B. Cross, Secretary.

CRANE CREEK IRRIGATION
LAND & POWER CO.,

By E. D. Ford, President.

Attest: E. P. Hall, Secretary.

Endorsed: Filed March 25, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

PLAINTIFF'S EXHIBIT NO. 39.

Supplemental Agreement.

This Supplemental Agreement, made and entered into this 8th day of November, A. D. 1913, by and between Slick Brothers Construction Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of Idaho (hereinafter called the "Contractor"), the party of the first part, and Crane Creek Irrigation Land & Power Company, a corporation organized and existing under the laws of the State of Idaho (hereinafter called the "Company"), the party of the second part, witnesseth: That,

Whereas, the parties hereto did heretofore enter into a certain contract and agreement bearing date the 2nd day of April, A. D. 1913, wherein and whereby the Contractor agreed to construct for the Com-

pany certain canals, dams, aqueducts, ditches, pipe lines, tunnels, flumes and other structures and irrigation works, to which said contract reference is hereby made for a more particular description of the works to be constructed thereunder and the terms and conditions thereof; and,

Whereas, the parties hereto did thereafter and on the said 2nd day of April, A. D. 1913, enter into a certain other agreement designated a Supplemental Agreement relative to the work to be done and the consideration to be paid under the agreement first hereinbefore mentioned; and thereafter the parties hereto did enter into a certain other agreement, bearing date the 22nd day of October, 1913, modifying and supplementing the contracts and agreements hereinbefore mentioned; and,

Whereas, the parties hereto have mutually agreed to cancel and annul the said supplemental agreement dated the 2nd day of April, A. D. 1913, and the said agreement dated October 22nd, 1913, and to make certain changes and modifications in said agreement first hereinbefore mentioned, bearing date the 2nd day of April, A. D. 1913.

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, the parties hereto have agreed and hereby do agree as follows, to-wit:

First. The said agreement designated as a Supplemental Agreement and bearing date the 2nd day of April, A. D. 1913, and the said agreement bearing date the 22nd day of October, 1913, between the

parties hereto are and each of them is hereby canceled, annuled and set aside and of no further force or effect.

Second. The said contract or agreement first hereinbefore mentioned bearing date the 2nd day of April, A. D. 1913, shall remain and continue in full force and effect, save and except as the same is hereinafter modified, supplemented or changed.

Third. The approximate estimates of the value of the work done or material furnished by the Contractor, to be made monthly as provided in the sixth paragraph of the said contract or agreement of April 2, 1913, shall be based upon the classifications of work to be done and performed and of material to be furnished and prices set forth in the revised schedule hereto attached, marked Exhibit "A" and made a part hereof; and the classifications and unit prices set forth in the nineteenth paragraph of the said agreement of April 2nd, A. D. 1913, are hereby canceled and annulled, and the same shall be of no further force or effect, but the same are superseded by the classifications and prices contained in the said schedule hereto attached and marked Exhibit "A."

Fourth. In view of the fact that J. S. and W. S. Kuhn, Incorporated, of Pittsburg, Pennsylvania, have no longer any interest in the said contract of April 2nd, A. D. 1913, or in the work to be performed hereunder or under said contract, the Tenth, Sixteenth and Twenty-first paragraphs of the said contract of April 2, 1913, are hereby canceled and annulled, and the terms and provisions in said para-

graphs, or either of them, contained shall be of no further force or effect or binding upon either of the parties hereto.

Fifth. All work to be done and performed and all material to be furnished or structures to be constructed by the Contractor for the Company shall be in accordance with the plans and specifications attached to and made a part of the said contract of April 2nd, A. D. 1913, as the same are modified, changed or amended by the supplemental specifications hereto attached, marked Exhibit "B" and made a part hereof.

Sixth. It is mutually agreed that the work to be done and materials to be furnished by the Contractor under what is known as Classes 1, 2 and 3 in said schedule, Exhibit "A," the same being earth, loose rock, and solid rock, shall be done and performed without regard to quantities or classification for the total or lump sum of One Hundred Twenty-nine Thousand One Hundred Fifty-one Dollars (\$129,151), which shall be in full payment for the earth, loose rock and solid rock specified in said schedule "A;" this, however, not to include payment for any work done or to be done on what is known as the "Reservoir Dam" or "Reservoir," and the prices for such work set forth in such schedule shall be used only for the purpose of making monthly or approximate estimates prior to the completion of such work; provided, that the structures and ditches required shall be built according to the survey heretofore made and as the same are now located and

staked out on the ground. The remainder of the work specified in said schedule "A" shall be performed and the materials furnished by the Contractor at the prices set forth in such schedule; and in the event the amount of work done and materials furnished exceeds the estimates set forth in said schedule "A" for such work or material, the Company shall pay for such excess at the rate specified in said schedule "A;" and in the event the amount of work to be done and materials furnished by the Contractor, other than the earth, loose rock and solid rock above referred to and to be done and performed at the lump sum hereinbefore stated, is less than the estimates set forth in said schedule "A" there shall be deducted from the said price of Three Hundred Fifty-four Thousand Dollars (\$354,000) to be paid the Contractor the difference between the estimates of such work contained in said schedule "A" and the work actually done and materials actually furnished, such deductions to be made at the rate specified in said schedule.

Seventh. That the total consideration to be received by the Contractor for doing the work specified in said schedule "A" is Three Hundred Fifty-four Thousand Dollars (\$354,000), subject to be increased or decreased as provided in the Sixth paragraph hereof; and in consideration of the fact that the Contractor has reduced the price for such work and material from Three Hundred Seventy Thousand Dollars (\$370,000) to Three Hundred Fifty-four Thousand Dollars (\$354,000), the Company

shall and it hereby does agree to pay all engineering charges and expenses of whatsoever kind incurred in connection with the doing of the work and the construction of the structures to be done, performed and constructed by the Contractor under said agreement of April 2nd, 1913, as hereby modified, supplemented and changed, including all engineering charges and expenses incurred prior to the date of this supplemental agreement; and the Twelfth paragraph of the said contract of April 2, 1913, is hereby canceled and annulled. But the Contractor shall not be entitled to any reimbursement or payment for any board or team hire furnished the engineers heretofore.

Eighth. That all work required to be done hereunder, except what pertains to what is known as the "Reservoir Dam," shall be completed on or before the 15th day of April, 1914, and said "Reservoir Dam" shall be completed not later than December 1st, 1914, to the extent contemplated by said schedule, Exhibit "A;" provided, that if the irrigation districts interested in said works mentioned in the said contract of April 2nd, 1913, consent to any extension of time in which to do any of the work to be done hereunder, the Contractor shall be entitled to the benefit of such extension or extensions.

Ninth. It is mutually agreed that A. J. Wiley, of Boise, Idaho, shall continue as the Chief Engineer of the Company, with all the power and authority vested in him or in the Chief Engineer under the said contract of April 2, 1913.

Tenth. Upon the completion of the work to be performed by the Contractor hereunder, except what is included in what is known as the "Reservoir Dam," a final settlement shall be had as to such work within the time and in the manner provided in the Sixth paragraph of the said agreement of April 2, 1913, as hereinbefore modified and amended, and upon the completion of the said "Reservoir Dam" the final settlement as to such work shall likewise be had. Provided, however, that if the consent of the said irrigation districts can be obtained thereto, the making of such final estimates and payment therefor shall be made within such shorter period than sixty days as the said irrigation districts may consent to.

Eleventh. All work to be performed by the Contractor for the Company shall be accepted from time to time as the work is done or performed or structures built, so as to enable the Contractor to make any changes therein that may be required before moving the outfit engaged in such work to some other point or place on the works.

Twelfth. The Company will pay the Contractor the sum of Thirty Thousand Dollars (\$30,000.00) at once on account of estimates heretofore made and given upon work performed prior to November 1, A. D. 1913, and the further sum of Twenty Thousand Dollars (\$20,000.00) on or before the 15th day of November, A. D. 1913, to be paid on account regardless of the amount of any estimates due the Contractor on account of said work, and to be ap-

plied upon contract price of said work. All future estimates and payments to be made in accordance with the provisions of said original contract, dated April 2, A. D. 1913, and the same is herein amended and modified.

Thirteenth. All materials to be furnished by the Contractor shall be accepted by the Company, or its engineers, f. o. b. cars or at the railroad siding or yards where the same may be unloaded for use in such works, and the same shall be included in the estimates for the month in which such material arrived at such railroad station, siding or point of unloading.

Fourteenth. The Company shall on or before the 29th day of November, 1913, furnish evidence satisfactory to the Contractor that the money required to pay for the work and material to be done or furnished by the Contractor hereunder is available for such payment.

Fifteenth. The parties hereto mutually release each other from all claim or right to damages on account of any matters in or growing out of said original contract, dated April 2, A. D. 1913, and the agreement supplemental thereto, dated April 2, 1913, and the supplemental agreement of October 22, A. D. 1913, of every kind and character, which either may have against the other at this date, or for or on account of any action or cause of action which may have accrued prior to the date hereof.

Sixteenth. It is hereby agreed that the Contractor shall obtain the acceptance of this supplemental

agreement by The Aetna Accident and Liability Company of Hartford, Connecticut, the surety on its bond to the party of the second part, before the same shall be in force or have effect.

In Witness Whereof, the parties hereto, by authority of their respective Boards of Directors, have caused their corporate names to be hereto subscribed by their respective officers, and their corporate seals to be hereto affixed, in duplicate, the day and year first above written.

SLICK BROTHERS CONSTRUCTION
COMPANY, Ltd.,

By W. B. Slick, its President.

Attest: Frank B. Cross, its Secretary.

CRANE CREEK IRRIGATION
LAND & POWER CO.,

By E. D. Ford, its President.

Attest: Nellie Saylor, its Secretary.

Endorsed: Filed March 25, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

SUNNYSIDE EXHIBIT "S."

This Contract, made and entered into in triplicate this the 19th day of April, 1913, by and between Crane Creek Irrigation, Land and Power Company, hereinafter called the Company, party of the first part, and Crane Creek Irrigation District, the party of the second part, and Sunnyside Irrigation District, the party of the third part, witnesseth:

Whereas, on August 22, 1910, the Company and

the party of the second part entered into a written contract for the sale and construction by the company and delivery to the party of the second part, of an irrigation system as in said contract specifically set forth, which contract is hereby referred to and made a part hereof,

And Whereas, by a contract of the same date, the Company, as party of the first part, entered into a similar contract with Sunnyside Irrigation District as second party thereto, for the construction of an irrigation system for said Sunnyside Irrigation District, which contract was in writing and is hereby referred to and made a part hereof,

And Whereas, the reservoir, water rights, main canals, etc., of the system to be built and furnished to Sunnyside Irrigation District and to Crane Creek Irrigation District are identical, each irrigation district getting an interest in and to said common water right, reservoir, main canal, etc.

And Whereas, the interest of the two irrigation districts are identical in all respects, save and except for the construction and completion of the distribution system for the distribution of water inside of each irrigation district wherein so far as said distribution system is concerned, neither district has an interest in the distribution system of the other.

And Whereas, paragraph XXVII. of each of said contracts between the Company and Sunnyside Irrigation District and Crane Creek Irrigation District, is identical save and except that the amount of bond to be delivered in the contract with the Crane

Creek Irrigation District is to be the sum of \$75,000, \$30,000 of which it is therein provided shall be by a surety company and \$40,000 by individuals, to be approved by the district; and in the contract with the Sunnyside Irrigation District, the amount of such bond is \$100,000, \$50,000 of which shall be of a surety company, and \$50,000 by individuals.

And Whereas bonding companies will not write such a bond as that, when a part of the surety is to be furnished by a bonding company and a part by individuals, covering the same work,

Now, Therefore, it is mutually agreed by and between the parties hereto that the Company in lieu of said bonds called for by said paragraph XXVII. of said contracts made with Sunnyside Irrigation District and Crane Creek Irrigation District, shall execute good and substantial bond in the sum of \$100,000, which bond shall be given by a surety company doing business in the State of Idaho, to the Crane Creek Irrigation District and the Sunnyside Irrigation District, jointly conditioned for the faithful performance of all the terms and conditions of each of said contracts dated August 22, 1910, between said Company and said Crane Creek Irrigation District and Sunnyside Irrigation District, which contracts are herein referred to and made a part hereof, in said contracts provided to be kept and performed by the said company for the construction of the irrigation works covered by said agreements and contracts in accordance with the plans and specifications in said contracts mentioned, and the com-

pletion and conveyance within the time herein stated, as supplemented by contract of this date as to time, and for the maintenance of said system for the period of five (5) years pursuant to the conditions of said contract dated August 22, 1910.

It being mutually agreed by and between the parties hereto that said joint surety bond shall take the place of and be in lieu of said bonds called for by said paragraph XXVII. of said two contracts aforesaid, and it is further mutually agreed that both the Sunnyside Irrigation District and the Crane Creek Irrigation District shall have the right of action against said bonding company for the failure on the part of the Company to perform all or any of the terms and conditions in said contracts set forth to be performed by said Crane Creek Irrigation Land and Power Company, and that said bond shall so provide.

It being further mutually understood and agreed that said bond shall be in such form as shall meet with the intendments of this supplemental agreement, and shall be in such form also as to meet with the approval of the Board of Directors and of Ed R. Coulter, the attorney for both the Crane Creek Irrigation District and the Sunnyside Irrigation District and shall be by him approved.

It is further mutually understood and agreed that this supplemental agreement shall not affect any of the terms and conditions of said two contracts dated August 22, 1910, save and except said paragraph

XXVII. of each of said contracts, and all the terms and conditions of said contract of August 22, 1910, with the exception of said paragraph XXVII. as herein amended shall be and continue in full force and effect, the intendments of this contract being only to vary the terms, amount and conditions of said bond.

It is intended that this contract shall be mutually binding upon and by and between each and every and all of the parties hereto.

In Witness Whereof, The respective parties hereto have caused their corporate names to be hereunto subscribed by their respective Presidents, sealed with their corporate seals and duly attested by their respective Secretaries, this the day and year first above written, pursuant to authority duly granted by resolution of their respective Boards of Directors.

CRANE CREEK IRRIGATION

LAND AND POWER CO.,

By E. D. Ford, its President.

Attest: E. P. Hall, Secretary.

CRANE CREEK IRRIGATION DISTRICT,

By Chas. C. Cleary, its President.

Attest: Daisy Dasch, Secretary.

SUNNYSIDE IRRIGATION DISTRICT,

By O. M. Harvey, its President.

Attest: Ed R. Coulter, Secretary.

Endorsed: Filed March 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

SUNNYSIDE EXHIBIT "P."

This Agreement made and entered into this the 19th day of April, 1913, by and between Sunnyside Irrigation District, a municipal corporation of Washington County, Idaho, party of the first part, and Crane Creek Irrigation Land and Power Company, a corporation organized and existing under the laws of the State of Idaho, the party of the second part, witnesseth:

Whereas There is now existing between the parties hereto a certain contract, dated August 22, 1910, for the erection, construction and completion of a certain dam, reservoir and irrigation works known as the Crane Creek reservoir and irrigation works, and for the conveyance by the party of the second part to the party of the first part of the certain portions or interest in said dam, reservoir and system, and

Whereas, Article Six of said contract provides among other things that said dam shall be completed so as to empound 50,000 acre feet of water in the reservoir by not later than the 22nd day of August, 1911, and that the entire proposed irrigation system shall be completed not later than the 1st day of May, 1912, and

Whereas, by a supplemental agreement made and entered into on the 3rd day of October, 1911, the party of the first part extended the time for the completion of the dam mentioned in said paragraph Six of said contract dated August 22, 1910, from the 22nd day of August, 1911, to the 1st day of Septem-

ber, 1913, and extended the time for the completion of the works mentioned in said contract from the 1st day of May, 1912, as set forth in said Paragraph Six of said contract, to the first day of September, 1913, and

Whereas, At this time, the party of the second part is desirous of further extension of time for the completion of said dam and irrigation works, and

Whereas, The dam and reservoir called for by said contract of August 22, 1910, has already been partially completed by the party of the second part, and to the extent that the same will now and does em-pound the sum of 35,000 acre feet of water,

Now Therefore, in consideration of the sum of One Dollar (\$1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and of other consid-erations hereinafter set forth, it is agreed by and be-tween the parties hereto as follows, to-wit:

That the party of the first part hereby extends the time for the completion of the dam mentioned in paragraph Six of said contract dated August 22, 1910, from September 1, 1913, to April 15, 1914, and hereby extends the time for the completion of the works mentioned in said paragraph of said contract of August 22, 1910, from the first day of September, 1913, to and until the fifteenth day of April, 1914.

Party of the second part, in consideration of the extension of time aforesaid, hereby agrees that it will forthwith and at once commence work upon the dam

and complete the same to the requirements of said Paragraph Six of said contract of August 22, 1910, on or before the 15th day of April, 1914.

And the party of the second part, for and in consideration of said extension of time as aforesaid, does further contract and agree that in the event said reservoir, dams and irrigation system shall not be completed and ready to deliver to the party of the first part as called for in paragraph Six of said contract, as amended by said contract of October 3, 1911, and this contract, on or before the 15th day of April, 1914, party of the second part will reimburse party of the first part for the interest on all bonds of the District delivered by the District to the Company for the time from the date of the issuance of said bonds until the first day of January, 1915, and also agrees to advance and pay to the district, the interest due on July first on said bonds for the first irrigation season thereafter, said district to repay said advancement to the Company on the first day of January following.

Paragraph XVII. of the construction agreement dated August 22, 1910, as modified, is hereby further modified in the following extent: The district will not require the company to pay any interest on any bonds delivered to it, after January 1, 1914, provided the irrigation system is completed and ready to deliver to the district on or before April 15, 1914, except as provided for in this agreement.

That said contract of August 22, 1910, shall in all other particulars be and remain in full force and ef-

fect and that the bonds called for by said contract shall be executed and delivered by party of the second part to party of the first part hereto to cover this contract as well as said contract dated the 22nd day of August, 1910.

In Witness Whereof, the party of the first part hereto has caused this contract to be executed by the Chairman of its Board of Commissioners, attested by its Secretary and sealed with its corporate seal, being thereunto duly authorized by a resolution of its Board of Directors, duly passed on this day, and the party of the second part has caused these presents to be executed by its President, sealed with its corporate seal and attested by its Secretary, being thereunto duly authorized by a resolution of its Board of Directors, duly passed this, all on the day and year first above written.

SUNNYSIDE IRRIGATION DISTRICT,

By O. M. Harvey, its President.

Attest: Ed. R. Coulter, Secretary.

CRANE CREEK IRRIGATION LAND

& POWER CO.,

By E. D. Ford, its President.

Attest: E. P. Hall, Secretary.

Endorsed: Filed March 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

DEFENDANT SUNNYSIDE & CRANE CREEK
IRRIGATION DISTRICT EXHIBIT "M."

This Agreement, Made and entered into this the 3rd day of October, 1911, in duplicate, by and be-

tween the Sunnyside Irrigation District, municipal corporation within Washington County, State of Idaho, and party of the first part, and the Crane Creek Irrigation Land & Power Company, a corporation, organized and existing under the laws of the State of Idaho, the party of the second part, witnesseth:

That, whereas, there is now existing between the parties hereto a contract in writing, dated the 22nd day of August, 1910, for the erection, construction and completion of a certain dam, reservoir and irrigation works known as the Crane Creek Dam, Reservoir and Irrigation Works, and for the conveyance by the party of the second part to the party of the first part of certain portions or interests in said dam, reservoir and system; and,

Whereas, Article VI. of said contract provides, among other things, that said dam shall be completed so as to store 50,000 acre feet of water in the reservoir by not later than the 22nd day of August, 1911, and that the entire proposed irrigation systems shall be completed by the last day of May, 1912, and,

Now, Therefore, in consideration of the sum of one dollar to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and other considerations hereinafter set forth, it is agreed by and between the parties hereto as follows, to-wit:

That the party of the first part hereby extends the time for the completion of the dam mentioned in paragraph VI. of said contract dated August 22nd,

1910, from the 22nd day of August, 1911, to the 1st day of September, 1913, and hereby extends the time for the completion of the works mentioned in said contract, from the first day of May, 1912, as set forth in said paragraph VI. of said contract aforesaid, to and until the 1st day of September, 1913.

The party of the second part, in consideration of the extensions of time aforesaid, hereby agrees that it will forthwith and as soon as possible, commence work upon the dam and complete a portion of the same, building to the height of forty-four feet, before the 31st day of December, 1911, the elements and weather permitting.

The party of the second part, for and in consideration of said extensions aforesaid, hereby contracts and agrees that in the event said reservoir, dam and irrigation system shall not be completed and ready for delivery to and is accepted by the party of the first part as called for by paragraphs VI. and 23 of said contract as amended by this contract, on or before the 15th day of May, 1913, the party of the second part agrees to reimburse the party of the first part for the interest on all bonds of the district delivered by the district to the Company, for the time from the date of issuance of said bonds until the 1st day of January, 1914, and also agrees to advance and pay for the district the interest due July 1st on said bonds for the first irrigation season thereafter, the district to repay said advancements to the Company on the 1st day of January following; and that the provisions of paragraph XVII. of said contract

aforesaid, shall remain in full force and effect except as herein changed.

That said contract of August 22nd, 1910, shall in all other particulars be and remain in full force and effect, and that the bonds called for by said contract, to be executed and delivered by the second party to the first party hereto, shall cover this contract as well as said contract of August 22nd, 1910.

In Witness Whereof, the party of the first part has caused these presents to be executed by the Chairman of its Board of Directors, attested by its Secretary and sealed with its corporate seal, being thereunto duly authorized by a resolution of its Board of Directors duly passed on this day, and the party of the second part has caused these presents to be executed by its President, sealed with its corporate seal and attested by its Secretary, being thereunto duly authorized by resolution of its Board of Directors duly passed, all on the day and year first above written.

SUNNYSIDE IRRIGATION DISTRICT,

By O. M. Harvey, its President.

Witnessed by John H. Norus, J. F. Clabby.

Attest: A. D. Redford, Secretary.

CRANE CREEK IRRIGATION LAND
& POWER CO.,

By E. D. Ford, its President.

Attest: E. P. Hall, Secretary.

Endorsed: Filed March 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

DEFENDANT SUNNYSIDE & CRANE CREEK
IRRIGATION DISTRICT EXHIBIT NO. "C."

This Agreement, made and entered into, in duplicate, this 22nd day of August, 1910, by and between the Crane Creek Irrigation Land and Power Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business at Weiser, Washington County, Idaho (hereinafter called the "Company"), party of the first part, and the Sunnyside Irrigation District, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business in said district, in Washington County, State of Idaho (hereinafter called the "District"), the party of the second part.

Witnesseth: Whereas, the Company and the District have this day entered into a written contract for the purchase by the District from the Company of an irrigation system and interest in an irrigation system now owned and being constructed, and to be constructed by the Company, according to certain plans and specifications therefor, attached to and made a part of said contract, which contract and the plans and specifications therefor and thereunto attached, are hereby referred to made a part hereof.

Now, Therefore, in consideration of the premises and of the mutual covenants and conditions hereinafter contained, to be kept, done and performed by the parties hereto, the Company hereby contracts and agrees to and with the District to maintain and oper-

ate said irrigation system, making all repairs that may be necessary to keep such system in condition for efficient use, including that portion embraced within the boundaries of the District, and including the distribution of water into the laterals of the consumers in accordance with the By-laws and Regulations of the District hereafter to be formed and adopted, relative to such distribution, and including the undivided interest of the District in that portion of said system lying outside of the boundaries of the District, for the period of five (5) years, from and after its completion, acceptance and conveyance to the District; and to deliver over said irrigation system at the end of said five (5) year period in the condition which the plans and specifications therefor require said irrigation system to be in, at the time of its completion and acceptance by the District, except ordinary use and wear thereof.

And in consideration of said services the District hereby agrees to pay the Company the sum of one dollar (\$1.00) per acre, per year, during said five (5) years period, for all the lands in said District against which are assessed the benefits of said system; said payments to be made annually upon the first Tuesday in January each year following such services.

It is further agreed that, in consideration of said payments so to be made by the District to the Company, as aforesaid, that the Company is to execute and deliver to the District good and substantial bonds, with sureties to be approved by the District,

in the sum of Fifty Thousand Dollars (\$50,000.00) conditioned for the faithful performance of all of the terms of this agreement by the Company to be kept and performed.

It is further agreed that in the event the Company gives a personal bond to the District for said obligation, or any part thereof, and the same is accepted by the District, the District reserves the right to require additional surety on said bond, or a new bond in lieu thereof, at any time that it may deem said undertaking insufficient on account of the sureties thereon becoming irresponsible for the several amounts for which they may have obligated themselves.

In Witness Whereof, the respective parties have caused these presents to be executed in duplicate by their respective Presidents, signed by their corporate names, sealed with their corporate seals, all on the day and year first above written, being thereunto duly authorized by resolutions by the respective Boards of Directors of the parties, duly passed on the 22nd day of August, 1910.

CRANE CREEK IRRIGATION LAND
& POWER CO.,

By E. D. Ford, President.

Attest: E. P. Hall, Secretary.

SUNNYSIDE IRRIGATION DISTRICT,

By O. M. Harvey, President.

Attest: A. D. Redford, Secretary.

Endorsed: Filed March 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

Warranty Deed, dated May 29, 1913, between Crane Creek Irrigation Land & Power Co., and Sunnyside Irrigation District. Consideration, \$151,000.00. For the following described property:

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to that certain permit number 1720, issued by the State Engineer of the State of Idaho, under date of December 16th, 1905, to one Edwin D. Ford, and recorded in Book 6 at page 1720 of the record in said State Engineer's office at Boise, Idaho, and those certain permits issued by said State Engineer to Edwin D. Ford and numbered 6830 and 6834 respectively, and heretofore conveyed to the company together with a like proportion of all the water thereby appropriated and all rights acquired under said permits; also forty-seven and two-tenths per cent. (47.2%) of the right of all flowage through the Northwest Quarter of the Northeast Quarter and the North Half of the Northwest Quarter of Section 19, Township 12 North, of Range 2 West of Boise Meridian in Idaho; and also forty-seven and two-tenths per cent. (47.2%) of the right of flowage through the Northeast Quarter of Section 24, in Township 12 North, of Range 3 West of Boise Meridian in Idaho, heretofore conveyed to the Company, to Grantor by Edwin D. and Hortense A. Ford, under date of May 9, 1910.

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to, all and singular, such right of way for canals, flumes and laterals as may be used in common by the Grantor and Grantee here-

in, and the Crane Creek Irrigation District acquired by the Grantor by purchase or by filing maps thereof as required by the regulations of the general land office of the United States and the acts of Congress in relation thereto, including an undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to said reservoir site, described in the certain indenture dated May 9th, 1910, between Edwin D. and Hortense A. Ford and the Grantor herein, which said indenture is of record in Book 26 of Deeds at page 413 of the records in the office of the County Recorder of Washington County, Idaho.

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to all completed portions of all canals, pipe lines, flumes and aqueducts situated wholly within the boundaries of said irrigation district and as shown upon the plat attached to that certain contract in writing between the parties hereto, dated the 22nd day of August, 1910.

All and singular, the completed portion of all main canals, distributing laterals, pipe lines, and flumes situate wholly within the boundaries of said irrigation district, and the same appear upon the plat above referred to, including rights of way for the same.

Hereby reserving unto party of the first part the sole right to use and enjoy all waters stored in said reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the second part the exclusive right to use the water impounded in said reservoir, including the

water hereby conveyed to party of the second part for the purpose of developing power provided the same shall not thereby be diminished in quantity or quality.

It is covenanted and agreed that this conveyance, when all the work contemplated in that agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof shall have been fully completed and performed, which said dinal conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.

Warranty Deed, dated June 12th, 1913, between Crane Creek Irrigation Land & Power Co., and Sunnyside Irrigation District. Consideration, \$21,400.-00. For the following described property:

All the completed portion of the Sunnyside lateral from station 0+00 to station 800, subject to the prior right of the Sunnyside Ditch Company, Limited, in and to said lateral from station 0+00 to station 471 according to the survey of Z. N. Vaughn and as now staked upon the ground.

Also forty-seven and two-tenths per cent. (47.2%) interest in and to the completed portion of the main canal of the party of the first part between stations 150 and 350 of the survey thereof by Z. N. Vaughn as staked upon the ground.

Hereby reserving unto party of the first part the perpetual right to carry water through said lateral for itself, customers and assigns in accordance with the contract dated August 22, 1910, between the parties hereto.

Hereby reserving unto party of the first part the sole right to use and enjoy all waters stored in said reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water hereby conveyed to party of the second part for the purpose of developing power provided the same shall not thereby be diminished in quantity or quality.

It is covenanted and agreed that this conveyance, when all the work completed in that agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof shall have been fully completed and performed, which said final conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.

Warranty Deed, dated September 1, 1913, between the Crane Creek Irrigation Land & Power Co., and Sunnyside Irrigation District. Consideration, \$77,-200.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 162+00 to 502+00 and 670+00 to 740+00 and 740+00 to 912+00 and between stations..... to stations.....on the Sunnyside lateral and between stations 0+00 to 109+80 east and from stations 0+00 to 782+40 west in the low line lateral, of the irrigation works of the party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also, reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those two

certain conveyances dated May 29th, 1913, and June 12th, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being under stood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated November 1, 1913, between Crane Creek Irrigation Land & Power Co., and Sunnyside Irrigation District. Consideration, \$38,300.-00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of the party of the first part between stations 93+00 to 502+00, 679+00 to 812+00, and 829+00 to 904+00; the entire Sunnyside lateral; and between stations 0+00 to 189+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 251+00 to 622+00, 698+00 to 730+00, 770+00 to 913+00 and 1232+00 to 1332+00 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also, reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those three certain conveyances dated May 29th, 1913, June 12th, 1913, and September 1st, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other work and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part

by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein.

This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portion of the works hereby conveyed.

Warranty Deed, dated December 1, 1913, between Crane Creek Irrigation Land & Power Company, and Sunnyside Irrigation District. Consideration, \$19,963.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 93+00 to 502+00, 679+00 to 812+00, and 829+00 to 904+00; the entire Sunnyside lateral; and between stations 0+00 to 189+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 251+00 to 622+00, 698+00 to 730+00, 770+00 to 913+00 and 1232+00 to 1332+00 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also, reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of

the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those four certain conveyances dated May 29th, 1913, June 12th, 1913, September 1st, 1913, and November 1st, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated January 2, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$27,842.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 782+40 west in the low line lateral, and between stations 0+00 to 110+00 east, and stations 0+00 to 532+00, 547+00 to 1048+00, 1176+00 to 1188+00 and 1232+50 to 1358+75 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred and seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir, including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this con-

veyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those five certain conveyances dated May 29th, 1913, June 12th, 1913, September 1st, 1913, November 1st, 1913, and December 1st, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated February 2, 1914, between Crane Creek Irrigation Land & Power Company and Sunnyside Irrigation District. Consideration, \$12,-963. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion

of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 109+00, 1174+00 to 1192+00, and 1226+85 to 1358+75 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir, including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those six

certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, and January 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated March 2, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$31,235.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 1091+00, 1174+00 to

1192+00, and 1226+85 to 1231+93 of the high line lateral, of the irrigation works of the party of the first part.

Hereby reserving unto the party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto the party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended, by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those seven certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, and February 2, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular

and accurate descriptions, including courses and distance of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated April 1, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$69,390.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west, in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 1091+00, 1174+00 to 1192+00, and 1226+85 to 1231+93 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy

thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those eight certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, and March 2, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial convey-

ances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed dated May 1, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$33,335.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west, in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 1091+00, 1174+00 to 1192+00, and 1226+85 to 1231+93 of the high line lateral, of the irrigation works of party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or elec-

tricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those nine certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, and April 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record, by party of the second part, until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated June 1, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$49,100.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 1091+00, 1174+00 to 1192+00, and 1226+85 to 1231+93 of the high line lateral, of the irrigation works of the party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part, for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation, together with those ten certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, and May 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated July 1, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$7,000.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 46+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and between stations 0+00 to 110+00 east and from stations 0+00 to 550+00 west in the low line lateral, and between stations 0+00 to 540+75, 547+00 to 1091+00, 1174+00 to 1192+00, and 1226+85 to 1231+93 of the high line lateral, of the irrigation works of the party of the first part.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part, for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract, dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and

performed, shall be delivered up to the party of the first part for cancellation, together with those eleven certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, May 1, 1914, and June 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated August 15, 1914, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District. Consideration, \$10,346.00. For the following described property:

An undivided forty-seven and two-tenths (47.2%) per cent. interest of, in and to the completed portion of the main canal of party of the first part between stations 37+00 to 502+00, 679+00 to 812+00 and 829+00 to 904+00; and the entire high line lateral,

and the low line lateral, as they are built both easterly and westerly from the Cove Creek siphon.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use of all the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part, for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract, dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation, together with those twelve certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, May 1, 1914, June 1, 1914, and July 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery

of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works, and a detailed description of the reservoir site known as the Crane Creek Reservoir shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated May 29, 1913, from Crane Creek Irrigation Land & Power Company and Crane Creek Irrigation District. Consideration, \$99,000.-00. For the following described property:

An undivided twenty-two and four-tenths per cent. (22.4%) interest of, in and to that certain permit numbered 1720, issued by the State Engineer of the State of Idaho, under date of December 16, 1905, to one Edwin D. Ford, and recorded in Book 6 at page 1720 of the record in said State Engineer's office at Boise, Idaho, and those certain permits issued by said State Engineer to Edwin D. Ford and numbered 6830 and 6834 respectively, and heretofore conveyed to the company together with a like proportion of all the water thereby appropriated and all rights acquired under said permits; also twenty-two and four-tenths per cent. (22.4%) of the right

of all flowage through the Northwest Quarter of the Northeast Quarter and the North Half of the Northwest Quarter of Section 19, Township 12 North, of Range 2 West of Boise Meridian in Idaho; and also twenty-two and four-tenths per cent. (22.4%) of the right of flowage through the Northeast Quarter of Section 24, in Township 12 North, of Range 3 West of Boise Meridian in Idaho, heretofore conveyed to the Company to Grantor by Edwin D. and Hortense A. Ford, under date of May 9, 1910.

An undivided twenty-two and four-tenths per cent. (22.4%) interest of, in and to, all and singular, such right of way for canals, flumes and laterals as may be used in common by the Grantor and Grantee herein, and the Sunnyside Irrigation District acquired by the Grantor by purchase or by filing maps thereof as required by the regulations of the general land office of the United States and the acts of Congress in relation thereto, including an undivided twenty-two and four-tenths per cent. (22.4%) interest of, in and to said reservoir site, described in the certain indenture, dated May 9, 1910, between Edwin D. and Hortense A. Ford and the Grantor herein, which said indenture is of record in Book 26 of Deeds at page 413 of the records in the office of the County Recorder of Washington County, Idaho.

An undivided twenty-two and four-tenths per cent. (22.4%) interest of, in and to all completed portions of all canals, pipe lines, flumes and aqueducts situated wholly within the boundaries of said irrigation district and as shown upon the plat at-

tached to that certain contract in writing between the parties hereto, dated the 22nd day of August, 1910.

All and singular, the completed portion of all main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of said irrigation district, and the same appear upon the plat above referred to, including rights of way for the same.

Hereby reserving unto party of the first part the sole right to use and enjoy all waters stored in said reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the second part the exclusive right to use the water impounded in said reservoir including the water hereby conveyed to party of the second part for the purpose of developing power provided the same shall not thereby be diminished in quantity or quality.

It is covenanted and agreed that this conveyance, when all the work contemplated in that agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.

Warranty Deed, dated June 12, 1913, from Crane Creek Irrigation Land and Power Company and

Crane Creek Irrigation District. Consideration, \$5,000.00. For the following described property:

An undivided twenty-two and four-tenths per cent. (22.4%) interest in and to the main canal of party of the first part between stations 150 and 350 according to the survey of Z. N. Vaughn as the same is now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all waters stored in said reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water hereby conveyed to party of the second part for the purpose of developing power provided the same shall not thereby be diminished in quantity or quality.

And hereby reserving unto party of the first part all portions of said works reserved to it in the contract dated August 22, 1910, as amended by the parties hereto.

It is covenanted and agreed that this conveyance, when all the work contemplated in that agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof shall have been fully completed and performed, which said final conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.

Warranty Deed, dated this 1st day of September, 1913, from Crane Creek Irrigation Land & Power Company and Crane Creek Irrigation District. Consideration, \$23,000.00.

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 162+00 to 502+00 and 670+00 to 740+00, all according to the survey of Z. N. Vaughn, for said main canal as the same is now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also, reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22nd, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and

performed, shall be delivered up to the party of the first part for cancellation together with those two certain conveyances dated May 29th, 1913, and June 12th, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated November 1, 1913, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration, \$16,623.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 93+00 to 502+00, 679+00 to 812+00, and the entire Smelter Lateral, all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those three certain conveyances dated May 29, 1913, June 12, 1913, and September 1, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be

executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated December 1, 1913, from Crane Creek Irrigation Land & Power Company and Crane Creek Irrigation District. Consideration, \$2,838.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 93+00 to 502+00, 679+00 to 812+00, and the entire Smelter Lateral, all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be

diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those four certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, and November 1, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works, and detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated January 2, 1914, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration, \$5,235.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the

first part for cancellation together with those four certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, and December 1, 1913, heretofore given by party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyance shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated February 2, 1914, between Crane Creek Irrigation Land & Power Company and Crane Creek Irrigation District. Consideration, \$5,031.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of C. N. Vaughn for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the

so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including water carried by the portion of the main canal hereby conveyed to the party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those six certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, and January 2, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the right of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by the party of the first

part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated March 2, 1914, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration, \$13,230.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of

said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation, together with those seven certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, and February 2, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the right of way for canals, and the canals, dams and other works, and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by the party of the first part, it being understood that the partial conveyance shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the work hereby conveyed.

Warranty Deed, dated April 1st, 1914, between Crane Creek Irrigation Land and Power Company

and Crane Creek Irrigation District. Consideration, \$32,655.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation, together with those eight certain conveyances dated May 29, 1913, June 12,

1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, and March 2, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by the party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyances herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated May 1, 1914, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration, \$26,675.00. For the following described property:

An undivided twenty-two and four-tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the

so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir, including water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation, together with those nine certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, and April 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and de-

livered to the party of the second part by the party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, dated June 1st, 1914, from Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration \$15,700.00. For the following described property:

An undivided twenty-two and four tenths (22.4%) per cent. interest in and to the completed portion of the main canal, of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving

unto the party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part, for cancellation, together with those ten certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, and May 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, Dated July 1, 1914, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration, \$2,000.00. For the following described property.

An undivided twenty-two and four tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 46+00 to 502+00, 679+00 to 812+00, all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto the party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement made between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of

the first part, for cancellation, together with those eleven certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, May 1, 1914, June 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Warranty Deed, Dated August 15, 1914, between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District. Consideration \$1.00. For the following described property.

An undivided twenty-two and four tenths (22.4%) per cent. interest in and to the completed portion of the main canal of the party of the first part between stations 37+00 to 502+00, 679+00 to 812+00, and the entire Smelter lateral and Weiser River siphon,

all according to the survey of Z. N. Vaughn, for said canals as the same are now staked upon the ground.

Hereby reserving unto party of the first part the sole right to use and enjoy all water stored in the so-called Crane Creek Reservoir in excess of seventy thousand six hundred seventeen (70617) acre feet; also reserving unto party of the first part the exclusive right to use the water impounded in said reservoir including the water carried by the portion of the main canal hereby conveyed to party of the second part for the purpose of developing power or electricity, provided the same shall not thereby be diminished or impaired in quality; and further reserving unto party of the first part all portions of said irrigation works reserved to it in the contract dated August 22, 1910, as supplemented and amended by the parties hereto.

It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto, dated August 22, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, shall be delivered up to the party of the first part for cancellation together with those twelve certain conveyances dated May 29, 1913, June 12, 1913, September 1, 1913, November 1, 1913, December 1, 1913, January 2, 1914, February 2, 1914, March 2, 1914, April 1, 1914, May 1, 1914, June 1, 1914, and July 1, 1914, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance containing particular

and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works, and a detailed description of the reservoir site known as the Crane Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.

Endorsed: Lodged July 8, 1915. Filed July 17, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,

Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, a corporation, et al.,

Defendants.

*Memorandum Decision on Claim of Plaintiff for Lien,
and Maney Brothers' Mortgage.*

May 17, 1915.

Richards & Haga, Attorneys for Plaintiff, defendant
Slick Bros. Construction Co., and Maney Bros.
& Co.

C. S. Varian and E. R. Coulter, Attorneys for Irrigation Districts.

B. S. Varian, Attorney for Crane Creek Irrigation Land & Power Co.

Dietrich, *District Judge*:

The suit was commenced by the Portland Wood Pipe Company, as plaintiff, to foreclose a mechanic's lien for material furnished to the defendant Slick Brothers Construction Company, for the construction of an irrigation system in Washington County, Idaho, against Slick Brothers Construction Company, a corporation, the Crane Creek Irrigation Land & Power Company, a corporation, Maney Brothers & Company, a corporation, and others, including the Crane Creek Irrigation District and Sunnyside Irrigation District, irrigation districts organized under the laws of Idaho, as defendants. Briefly stated, the facts out of which the controversy has grown are, that, in August, 1910, the defendant Crane Creek Irrigation Land & Power Company, reciting that it was the owner of certain water rights, a reservoir site, and rights of way for canals upon which certain construction work had been done, entered into separate contracts with the two defendant irrigation districts, under the terms of which it was to complete the construction of the reservoir and canals as called for by plans and specifications attached, and, with certain recervations, to make conveyance thereof in undivided interests to the two irrigation districts severally, for the permanent ownership and use by them for the irrigation of the lands which they em-

brace. In payment for the system when and as the same should be completed the districts agreed to turn over to the Power Company their several coupon bonds at their face value to the amount of the specified purchase price. In some of their features the contracts are unusual, and are probably to be accounted for by the fact that under the laws of the state, as they existed at the time of the execution of the contract, irrigation districts were authorized to dispose of their bonds only by a sale for cash to the highest bidder or by an exchange thereof at par for irrigation works; they could not use them in payment for construction work. Such is the view taken by the Supreme Court of California of a law of that state, of the same general purpose and scope.

Hughson v. Carne, 115 Cal. 404; 47 Pac. 120. The same court later held that it was competent for districts to enter into contracts for the purpose of systems to be constructed.

Stowell v. Rialto Irr. Dist., 155 Cal. 215; 100 Pac. 248. It is to be inferred that the contracts here were drawn to conform with the views expressed in these decisions.

The Power Company entered into a contract for construction work on the system with Maney Brothers & Company, and later with the Slick Brothers Construction Company for the completion of the system. It settled with Maney Brothers by the execution of a note for a large amount, secured by a mortgage upon the system, only a small part of which was then completed, and with Slick Brothers Construc-

tion Company by a written agreement, pursuant to which it was to deposit with a trustee certain bonds and securities, the proceeds of which were to be paid out to creditors in the manner therein provided. At the time this suit was commenced there was due to Maney Brothers, on account of the mortgage note, \$35,986.10, with interest thereon at the rate of six per cent from December 27, 1913. According to the contention of Slick Brothers Construction Company, there was also due to it a large balance, for which it had filed notice of a mechanic's lien, which it sought to foreclose in this suit. At the close of the trial I held that the Power Company had substantially complied with the agreement of settlement by placing the bonds and other securities in the hands of the trustee agreed upon, and therefore denied relief to Slick Brothers. Admittedly there is due to the plaintiff, the Portland Wood Pipe Company, \$10,317.44, which is the basis of the lien upon which the complaint is predicated.

The system was completed, and in accordance with the contract between the irrigation districts and the Power Company it was conveyed in separate shares to the districts, and at the time the suit commenced they were the owners of the legal title thereto. As already stated, there is no controversy as to the amount due from the Power Company to Maney Brothers, or from Slick Brothers Construction Company to the Portland Wood Pipe Company, but the irrigation districts contend that they held the property free from both the mortgage and the plaintiff's claim of lien.

First disposing of
THE LIEN CLAIM OF THE PORTLAND WOOD
PIPE CO.

Briefly stated, the districts' contention is that they are municipal corporations, that their property is dedicated to public uses, and that therefore it is exempt from the operation of the mechanic's lien laws of the state. It is argued that while Section 5110 of the Revised Codes in general terms confers the right of lien upon any person performing labor upon or furnishing materials to be used in the construction of any work, the section is not to be deemed to extend the right of lien to property belonging to the state or municipal corporations. Attention is called to Section 5111, which expressly provides for a lien in favor of sub-contractors, laborers, and persons furnishing material (but not original contractors), in case of structures belonging to "any county, city, town or school district," and to still another provision of the law by which contractors are required to furnish bonds to municipal corporations, including irrigation districts, to indemnify not only the corporation, but also any person furnishing labor or material, and the conclusion is drawn from the several provisions that the legislature did not intend to provide for a lien in favor of either a material man or a laborer in the case of structures or improvements belonging to an irrigation district. It would be strange for the legislature to extend the right of lien to buildings and other property belonging to a county, city, town, or school district, and withhold

it in the case of an irrigation district; and it is difficult to believe that such was the intention. But that question is not involved here. The material furnished by the plaintiff was for the construction of works belonging to the Power Company, not to the irrigation districts. It is true that the system was to be conveyed to the irrigation districts, but doubtless as they understood the law they could not contract to pay bonds for the construction of irrigation works, and they therefore intended that the construction should be for the Power Company, and that they would buy the completed structures. That being the case, they took title subject to such liens as incumbered the property when it came into the possession and ownership of the Power Company, and very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction. *Creer v. Cache Valley Canal Co.*, 4 Idaho, 280; 38 Pac. 653. *Garland v. Irrigation Company*, 9 Utah, 350; 34 Pac. 368; 163 U. S. 687. *Fosdick v. Schall*, 99 U. S. 235. *Holt v. Henley*, 232 U. S. 637. The districts will not be permitted to take a position now inconsistent with that which they maintained that before the plaintiff furnished the pipe material it made inquiry and learned the nature of the contract between the Power Company and the irrigation districts, and was thus advised that the irrigation districts did not claim that they owned the property, or that the Power Company was merely a construction company.

There is no contention here that the districts required the Power Company to give a bond, which was their bounden duty to do if it was deemed to be a construction company. Undoubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property.

I reject the suggestion that inasmuch as Slick Brothers Construction Company entered into the contract of settlement already referred to, with the Power Company, and thus waived its lien, the right of the plaintiff was thereby cut off. The statute confers upon the material man an independent right to a lien, of which he cannot be divested without his consent.

THE MANEY BROTHERS MORTGAGE.

We now come to a consideration of the validity and dignity of the Maney Brothers mortgage. There is no dispute that there remains due thereon a balance of \$35,986.10, besides interest from December 27, 1913, at the rate of six per cent per annum. The Power Company, mortgagor, makes no resistance, and the only defense is that interposed by the irrigation districts, which contend that under their contract of purchase and the subsequent deeds made in pursuance thereof, they took an unincumbered title to the property. As already stated, the contract of purchase was executed on August 22, 1910,

whereas the mortgage was not made until September 29, 1911; and the deeds were all executed at still later dates. Presumably a question having arisen as to the status of the mortgage lien, the mortgages on July 10, 1914, procured the passage of a resolution, at a joint meeting of the boards of directors of the two districts, expressing the view of the boards that the title received by the districts was subject to the mortgage, but there was appended an express disclaimer of any intention to waive any rights which the districts then possessed. It is scarcely necessary to observe that with this proviso the resolution did not even purport to enlarge the rights of the mortgagees. Later, namely, on August 18, 1914, the boards of directors, acting separately, passed a resolution ratifying a certificate executed by the president of each district, dated June, 1914, certifying to certain undisputed facts touching the history of the transaction and purporting to concede that the mortgagees' rights were superior to those of the districts. But both the certificate and the subsequent ratification were without consideration, and even were it to be assumed that an irrigation district may be estopped by the unauthorized acts of its officers, there were wanting here some of the essential elements of estoppel. I am therefore clearly of the opinion that both the resolutions and the certificates must be laid aside as having no efficacy whatsoever.

There remains the general question whether the transfer consummated by the deeds delivered from

time to time as portions of the system were completed, relates back to the date of the contract and cuts off the intervening mortgage lien. It is conceded that for certain purposes at least this doctrine of relation is to be recognized, but it is not to be given effect here, it is argued, because it would work an injustice and it is never invoked where such would be the result. The supposed injustice lies in the fact that if the mortgage is defeated the mortgagor may be unable to recover all of the mortgage debt. The gist of the contention seems to be that in case of an executory contract for the sale of real property the vendor retains the power to transfer the legal title to a third person or subject it to a lien, and in such cases the transferee or mortgagee is subrogated to the rights of the vendor, and is entitled to receive the unpaid portion of the purchase price. Specifically it is urged that the mortgage lien here attached to the unpaid purchase price, and that the districts having notice, both constructive and actual, of the existence of the mortgage, paid the Power Company at their peril. But the application of the principle to the facts in hand is not so plain or simple. The contract in question was for the purchase of an indivisible unit of property. No substantial part of it was in existence at the time the contract was made; it was largely to be created before it could be transferred. Admittedly, when completed it was to be conveyed free from all incumbrances. What then were the rights and duties of the districts? Clearly it was their right to take such course as was reason-

ably necessary to secure the performance of the contract, and, as already stated, one of the provisions of the contract was that they should receive title to the completed system free from incumbrances, of which condition mortgagees at all times had knowledge. Now what in fact did they do? So far as the record shows, they paid the purchase price by turning their bonds over to the Power Company to be used by it in procuring the construction of and title to the property conveyed by the contract, and the bonds were so used. In view of the record, it is idle to talk about withholding the purchase price and applying it to the discharge of the mortgage indebtedness. Had such a policy been suggested at the outset, the contractors would doubtless have declined to proceed with the work, and if it had been adopted after the work was done, mechanic's liens would have been asserted against the property. That the lien of those who, by supplying labor and material, created the property, was superior to the equity of the districts, I have already held, and that it was superior to the mortgage lien is scarcely open to controversy. Under such circumstances, it was the right of the districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers, and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagee the balance, it need only be said that there is no showing that there was any balance. So far as appears none of the bonds constituting the purchase price

has been turned over to or retained by the Power Company for its own profit.

It is now quite immaterial that the mortgage indebtedness originated in construction work done by the mortgagees upon a branch of this irrigation system. If we assume that up to the time they took the mortgage their right to a mechanic's lien remained unimpaired, they abandoned that right by taking the mortgage. It may very well be true that if they had then insisted upon such a lien the project would have fallen through and they would have been left with worthless security. But however that may be, and whatever may have been their motives, they waived their statutory lien and took the mortgage, and their status here is that of a mortgagee and nothing more.

There is this further consideration: The districts, as we have seen, were under no obligation to pay the Power Company money; the price was to be paid in bonds. If the mortgagees were resting upon the theory that as holders of a mortgage they were in a sense subrogated to the right of the Power Company to receive the purchase price, why did they not demand that a part of the purchase price be turned over to them? They apparently knew that the bonds were being delivered, and yet made no demand or protest. Great difficulty was experienced in negotiating the bonds even at heavy discounts. From the record can we say that the mortgagees would have been willing to take them at their face value or for that matter at any price? Upon their own

theory, their mortgage at most conferred upon them a conditional right to receive a part of the unpaid purchase price. But the purchase price consisted not of money but of bonds, and at no time during the entire transaction did they intimate a willingness to accept bonds, nor up to the present time have they manifested such willingness. They are insisting upon the payment of their claim in money. As against their debtor, the Power Company, such is their right, but in view of the law, upon any state of facts either real or assumed, was it ever the duty of the districts to pay them any part of their demand in money. In view of these considerations it is thought that the lien of the mortgage does not extend to such property rights and interests as were covered by the contract and have been conveyed to the districts pursuant to the terms thereof. A foreclosure will therefore be granted only as to the other property described in the mortgage, including the interest reserved by the Power Company in the irrigation system.

As to attorneys' fees, possibly the amount testified to, namely, \$1,000.00, would not be excessive for the Portland Wood Pipe Company, if counsel who represent it were not otherwise employed in the case, but taking into consideration the fact that the same counsel also represent the mortgagees and Slick Brothers, I am inclined to think \$750.00 will be an adequate allowance on this account. As to Maney Brothers, their principal controversy, namely, that their lien extends to the property of the Irrigation Dis-

tricts, is found to be without valid basis, and insofar as the legal services pertain to that controversy, they must themselves bear the expense. For other services they are entitled to recover, and \$1,000.00 will be awarded on account thereof.

My conclusion as to the Slick Brothers claim was announced orally. As to the Comerford claim, after a ruling upon the controlling questions, I am advised of a complete settlement between the interested parties. Both the cross-complaint and the counter-claim will therefore be dismissed as settled.

Counsel for the plaintiff will draught form of decree and submit the same to other counsel in the case.

Endorsed: Filed May 17, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
tion,

Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW

WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation,

Cross-Complainant

VS.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, et al.,

Cross-Defendants,

AND

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells),

Cross-Complainant,

VS.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, UTAH FIRE CLAY COMPANY, a corpor-

ation, PORTLAND WOOD PIPE COMPANY, a corporation, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, GEO. C. CATER, E. D. FORD, A. G. BUTTERFIELD, and R. C. MCKINNEY,

Cross-Defendants.

DECREE.

In Equity. No. 511.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz:

1. That the defendants, Idaho National Bank, a corporation, C. R. Shaw Wholesale Company, a corporation, Utah Fire Clay Company, a corporation, Pete March, G. A. Heman, J. M. Pinckard, F. A. Squier, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, James M. Magee, C. A. Smith, J. L. Smith, George F. Smith, Claude F. Smith, A. T. Schwab, A. L. Chenoweth and George C. Cater have no interest, lien, claim, or demand on or against the irrigation works, water rights, canals, structures, lands and premises hereinafter described, or any part thereof; and plaintiff's said Bill and the several Cross-Bills filed herein are dismissed as to H. H

Begley, Henry Whitmore, L. F. Easton, J. C. Toney, Thomas Sherry and E. H. Hasbrouck, originally made parties defendant in this cause.

2. That the defendant and cross-complainant, S. C. Comerford, take nothing by his cross-complaint herein, and the cross-bill of said S. C. Comerford is hereby dismissed.

3. That said Portland Wood Pipe Company do have and recover from the defendant Slick Brothers Construction Company, Limited, the sum of \$9,733.-94 with interest thereon at the rate of eight per cent. (8%) per annum from the 24th day of June, 1914 and the sum of \$6.60 for recording mechanic's lien filed by said plaintiff and described in its bill of complaint, and the further sum of \$750.00, attorney's fee, making in the aggregate the sum of \$11,244.30, together with its costs of suit, taxed at \$137.60.

4. That the said plaintiff, Portland Wood Pipe Company, is entitled to and has a first charge and lien for the security and payment of the above sums of money upon all the right, title, and interest of the defendants Sunnyside Irrigation District and Crane Creek Irrigation District in and to the following described property:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office at Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, and which said application was approved by Thomas Ry-

an, Acting Secretary of the Interior, on the 26th day of October, 1907; and which said reservoir and reservoir site is more particularly described in said application and on the duplicate map filed in connection with said application and kept on file in the United States Land Office at Boise, Idaho, and the dam for which said reservoir is situated in the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$), Section Nineteen (19) of said Township and Range; and all lands situated within said reservoir site, including the right of way secured as aforesaid from the government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals, and other structures, dams and works used, or intended to be used, or required in connection with the distribution of the water from said reservoir and carrying and distributing said water to the place or places of intended use; and all rights of way therefor, and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section 7, Township 11 North, Range 3 West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30, and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19, and 18 in Township 10

North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (N. E. $\frac{1}{4}$) of Section 23, Township 10 North, Range 5 West, B. M.; and also that certain siphon and branch canal branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (N. W. $\frac{1}{4}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23, and 22, and in a southerly and westerly direction through Sections 27, 28 and 32, Township 11 North, Range 4 West, B. M.; and all branch canals, main and subordinate laterals, service ditches, pipe lines, headgates, and other structures of every kind and nature used, or intended to be used, in connection with said irrigation system, or any part thereof, being the identical irrigation system constructed by the Crane Creek Irrigation Land & Power Company under its contract with the defendants Sunnyside Irrigation District and Crane Creek Irrigation District, and in which system and irrigation works said Crane Creek Irrigation Land & Power Company has conveyed, subject to plaintiff's said lien, an undivided 22.4% interest to said Crane Creek Irrigation District, together with all of what is known as the Smelter Lateral and the Weiser River Siphon; and in which said system and irrigation works said Crane Creek Irrigation Land & Power Company has conveyed to the defendant Sunnyside Irrigation District, subject

to plaintiff's said lien, an undivided 47.2% interest, and all of what is known as the High Line Lateral Sunnyside Ditch, and also what is known as the Low Line Lateral as built both easterly and westerly from what is known as the Cove Creek Siphon.

(c) Also all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures, hereinbefore described, acquired by said defendants, Sunnyside Irrigation District and said Crane Creek Irrigation District, under their several contracts with the defendant Crane Creek Irrigation Land & Power Company, and particularly the interest of said districts in the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

Permit No. 8507, recorded Book 27, page 8507, issued Aug. 10, 1912.

5. That the said plaintiff Portland Wood Pipe Company is entitled to and has a charge and lien for the security and payment of the above sums of money upon all the right, title, and interest of the Crane Creek Irrigation Land & Power Company in and to the reservoir, canals, water rights, irrigation system, works and structures above described, which said lien or charge is subject only to the lien of the mortgage of Maney Brothers & Company, hereinafter referred to; and that the interest of said Crane Creek Irrigation Land & Power Company upon which plaintiff is adjudged and decreed a second lien or charge, subject as aforesaid to the mortgage of Maney Brothers & Company, is an undivided 30.4% in said canals, irrigation works, water rights, structures, and reservoir, to a reservoir capacity of 70,617 acre feet, and all of the reservoir capacity in excess of 70,617 acre feet and all right to the use of the water impounded in said reservoir for the development of power, being all the interest in said irrigation system, reservoirs, canals and water rights not conveyed by said Crane Creek Irrigation Land & Power Company to the said irrigation districts, and the interest so conveyed being as aforesaid an undivided 22.4% to said Crane Creek Irrigation District and an undivided 47.2% to said Sunnyside Irrigation District, with the reservation in said Crane Creek Irrigation Land & Power Company of all water stored in said reservoir in excess of 70,617 acre feet.

6. That the mechanic's lien of the said plaintiff Portland Wood Pipe Company is prior and superior

to any of the claims or liens of the defendants in this cause, except as to the interest of said Crane Creek Irrigation Land & Power Company in said irrigation system, reservoir and water rights, as to which interest the mechanic's lien of said Portland Wood Pipe Company is subject and subordinate to the mortgage of Maney Brothers & Company hereinafter referred to.

It is further ordered, adjudged and decreed, that the defendant Slick Brothers Construction Company, Limited, shall within thirty days after the entry of this decree pay, or cause to be paid, to said Portland Wood Pipe Company, or to the Clerk of this Court for the use and benefit of said plaintiff, the sums of money hereinbefore mentioned, together with interest thereon from the date of entry of this decree to the date of such payment at the rate of seven per cent. (7%) per annum, and that unless said payment be made by said defendant Slick Brothers Construction Company, Limited, or by any of the other defendants in this cause, or by any one in their behalf, within the time and in the manner herein described, all the property hereinbefore described may be sold as hereinafter directed to satisfy said claim of plaintiff; and that under and by said sale all equity of redemption, except as hereinafter provided, of the defendants, and each and every of them, and of any and all persons claiming by, through, or under said defendants, or either of them, except the lien or claim of said Maney Brothers & Company in and to the said property, lands, rights, and franchises, be fore-

closed and cut off and forever barred, and that said property be sold as an entirety and in one parcel without valuation or appraisement, but subject to the prior lien of the mortgage of Maney Brothers & Company against the interest of said Crane Creek Irrigation Land & Power Company in said property, at public auction to the highest bidder or bidders at the Court House in Weiser, Washington County, State of Idaho, on a day or days to be fixed by the Special Master of this Court, and public notice of such sale and the time and place thereof, together with the manner and terms upon which said sale is to be conducted, shall be given by such Special Master in the manner following, to-wit:

Said Special Master shall give notice of such sale by advertisement in a newspaper published at Weiser, Washington County, Idaho, once a week for at least four weeks next prior to such sale, and said notice shall, among other things, briefly describe in general terms the property and irrigation works to be sold, making reference to this decree for a full description thereof; and such Special Master shall have the power to adjourn said sale from time to time to a future date by oral announcement made at any time before the sale, or at the time noticed for such sale, by consent of the solicitors for plaintiff, or either of them, or the approval of the Judge of this Court, without prejudice to the notice or notices of sale and without necessity of publishing any further notice; but the Special Master may nevertheless give such notice of his action by publication or by

posting at the front door of said Court House, or otherwise, as he may deem fit.

That any party to this action may become a bidder or purchaser at said sale. That said sale shall be for cash, ten per cent. (10%) to be payable at the time of said sale, and the balance to be paid at the time of the confirmation by this Court of said sale.

That if the plaintiff Portland Wood Pipe Company shall bid in said property, then and in that event said bidder shall be entitled to have its judgment, or so much thereof as may be necessary, credited upon such bid instead of paying cash, paying, however, a sufficient sum in cash to satisfy and discharge all expenses of said sale.

That said Special Master shall make full report of his proceedings hereunder, and such supplemental reports from time to time as may be necessary and desirable to show fully his action in the premises: and upon said Special Master filing his report of sale, the purchaser or any party to this suit may move for confirmation thereof, and a time shall be set for the hearing of said motion and such objections as may be made to said confirmation; and if the sale be not confirmed a re-sale shall be ordered as authorized by law; and upon any such re-sale the same proceedings shall be had as upon the original sale, save and except that no further notice thereof need be given than a brief notice of the time and place of re-sale referring to the notices first published for the terms and conditions thereof, and for a

description of the property, which notice shall be published for such duration as the court in its order for re-sale may direct.

It is further ordered, adjudged and decreed, that upon payment of the purchase price by the purchaser or purchasers of said property, that said Special Master shall execute and deliver a deed conveying the property purchased to said purchaser or purchasers, or his or their successors or assigns, and upon the execution and delivery of such deed and the expiration of the period of redemption as hereinafter fixed, the grantee under said deed shall be let into the possession of the premises conveyed, and shall be entitled to hold and enjoy and possess said premises and property and all the rights, privileges, immunities and franchises thereto appertaining, free and clear of any lien or liens of any of the defendants herein, except the lien of the mortgage of Maney Brothers & Company as to the interest of said Crane Creek Irrigation Land & Power Company in said reservoir, water rights, canals, and irrigation works.

It is further ordered, adjudged and decreed, that in case the proceeds of said sale shall prove to be insufficient to provide for the payment in full of the sums hereinbefore mentioned and described, then such Special Master shall find and report to this Court the amount of such deficiency or deficiencies, and such report being confirmed by this Court, plaintiff shall be entitled to judgment therefor against the defendant Slick Brothers Construction Company,

Limited, and to have execution issued thereon pursuant to the rules and practice of this Court.

It is further ordered, adjudged and decreed, that W. C. Dunbar, Esq., of Boise, Idaho, be, and he is hereby, appointed Special Master to execute this decree and make the said sale, and to execute and deliver the deeds of conveyance of the property sold to the purchaser or purchasers thereof. As soon as any sale shall have been made by the said Special Master, in pursuance of this decree, he shall report the same to this Court for confirmation, and shall from time to time thereafter make such further supplemental reports as shall be necessary to keep the Court and the parties to this suit properly advised of his proceedings in the execution of this decree.

It is further ordered, adjudged and decreed, that the defendant Crane Creek Irrigation Land & Power Company, hereinafter sometimes called the Crane Creek Company, duly made, executed and delivered to said Maney Brothers & Company the note and mortgage described in said cross-complainant's cross-bill, and that such note was duly endorsed by the defendants E. D. Ford, A. G. Butterfield and R. C. McKinney, and that said E. D. Ford, A. G. Butterfield and R. C. McKinney are liable for the payment of the full amount due said cross-complainant.

And it is further ordered, adjudged and decreed, relative to the claim of said Maney Brothers & Company as follows, viz:

1. That said Maney Brothers & Company do have and recover from the defendant Crane Creek Irriga-

tion Land & Power Company, E. D. Ford, A. G. Butterfield, and R. C. McKinney, and each of them, the sum of \$35,986.10, with interest thereon at the rate of six per cent. (6%) per annum from the 27th day of December, 1913, and the sum of \$1,000.00 as attorney's fee for the foreclosure of said mortgage, making in the aggregate the sum of \$40,140.00, and costs and disbursements herein, taxed at \$65.60.

2. That the payment of the aforesaid sums is secured by the said mortgage from said Crane Creek Company to said cross-complainant, described in the cross-complaint and bearing date the 29th day of September, 1911, which said mortgage is a first charge and lien upon all the right, title and interest of the defendant Crane Creek Irrigation Land & Power Company in the lands and premises, reservoir, canals, irrigation works, structures and water rights hereinbefore described; and that the interest of said Crane Creek Irrigation Land & Power Company, subject to the conditions hereinafter contained, in said irrigation system is an undivided 30.4% in said canals, irrigation works, water rights, structures, and reservoir (excepting those certain canals and laterals hereinbefore adjudged as having been entirely conveyed to the Crane Creek Irrigation District or the Sunnyside Irrigation District), until the capacity of the reservoir amounts to 70,617 acre feet; and said Crane Creek Company is the owner, subject to said mortgage, of all reservoir capacity in said reservoir in excess of 70,617 acre feet, and of all right to the use of the water impounded in said reservoir for the development of power.

3. That the mortgage of said cross-complainant is prior and superior to any of the claims or liens of the said defendants in this cause as against the right, title and interest, and the whole thereof, of said Crane Creek Company in and to the said reservoir, canals, water rights, irrigation system, works, and structures; but the interest in said irrigation works, reservoir, water rights, canals and structures conveyed by said Crane Creek Company to the Sunnyside Irrigation District, to-wit: An undivided 47.2% and the interest conveyed by said Crane Creek Company in said property, irrigation works, water rights, reservoir, canals and structures to the Crane Creek Irrigation District, to-wit: An undivided 22.4% interest, are free and clear of the lien of said mortgage, and said cross-complainant Maney Brothers & Company has no lien, claim, or demand whatsoever on or against the interests of said Crane Creek Irrigation District and of said Sunnyside Irrigation District in and to the said reservoir, irrigation works, water rights, canals and structures.

4. That the said mortgage of the cross-complainant Maney Brothers & Company, is also a first charge and lien for the security of the payment of the sums of money so due cross-complainant, as aforesaid, as against any right, title and interest of the defendants herein in and to the following described lands and premises:

S. E. $\frac{1}{4}$ of Sec. 5.

E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the
S. E. $\frac{1}{4}$ of Sec. 10.

N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 15.

E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 10.

N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 17.

E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 17.

S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 8.

S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the
S. W. $\frac{1}{4}$ of Sec. 11.

N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 14.

N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of
the N. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N.
W. $\frac{1}{4}$ of Sec. 12.

Lot No. 4, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of
Sec. 7.

All in Township Ten (10) North, Range Four
(4) West, B. M.

S. W. $\frac{1}{4}$ of Sec. 27.

N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the
N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$
of Sec. 13.

All in Township Eleven (11) North, Range
Four (4) West, B. M.

E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 12, Township Ten
(10) North, Range Five (5) West, B. M.

N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 9.

N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 9.

S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 9.

S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 7.

N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 8.

N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 8.

N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 9.

S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 10.

N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 10.

All in Township Ten (10) North, Range Four
(4) West, B. M.

N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 33.

S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 33.

N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 33.

N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 33.

S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 33.

S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 33.

N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 33.

N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 33.

All in Township Eleven (11) North, Range
Four (4) West, B. M.

S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 2, Township
Ten (10) North, Range Five (5) West,
B. M.

N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 10.

S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 10.

S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 10.

N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 10.

N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 10.

S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 10.

S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 10.

N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 11.

N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 13.

N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 13.

N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 14.

N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 15.

N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 15.

S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 15.

All in Township Eleven (11) North, Range
Six (6) West, B. M.

S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 36.

S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36.

S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36.

N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36.

N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 36.

All in Township Eleven (11) North, Range
Five (5) West, B. M.

5. That the defendants Crane Creek Irrigation Land & Power Company, E. D. Ford, A. G. Butterfield, and R. C. McKinney shall within thirty days after the entry of this decree pay, or cause to be paid, to said cross-complainant Maney Brothers & Company, or to the Clerk of this Court for the use and benefit of said cross-complainant, the sums of money hereinbefore mentioned, to-wit: The sum of \$40,140.00, together with costs and disbursements herein, and interest thereon from date of entry of this decree to the date of such payment at the rate of seven per cent (7%) per annum; and if such payment be not made by said defendants or by any one for them, within the time and in the manner herein described, all the property hereinbefore described and upon which the mortgage of said cross-complainant has herein been adjudged and decreed a lien may be sold as herein directed to satisfy said claim of the said cross-complainant; and that under and by said sale all equity of redemption, except as hereinafter provided, of said defendants and each and every of

them, and of any and all persons claiming by, through, or under said defendants, or either of them, in the said lands and premises, reservoir, canals, irrigation system, works, structures, and water rights, be foreclosed, cut off and forever barred, and that said property be sold as an entirety and in one parcel, without valuation or appraisement, at public auction, to the highest bidder or bidders, at the Court House in Weiser, Washington County, State of Idaho, on a day or days to be fixed by the said Special Master of this Court, and public notice of such sale and the time and place thereof, together with the manner and the terms upon which said sale is to be conducted, shall be given by such Special Master in the manner hereinbefore directed relative to the sale under the claim and lien of the plaintiff Portland Wood Pipe Company, and the directions and provisions of this decree relative to such sale and the confirmation thereof and the execution of deeds and other necessary conveyances to the purchaser shall be observed, so far as applicable, in the sale that may be had to satisfy the claim of said Maney Brothers & Company. That any party to this action may become a bidder or purchaser at such sale; and if the cross-complainant Maney Brothers & Company, or any one for them or in their behalf, shall bid in said property, then and in that event such bidder shall be entitled to have the judgment in favor of said Maney Brothers & Company, or so much thereof as may be necessary, credited upon such bid instead of paying cash, paying, however, a sufficient sum in cash to satisfy and discharge all expenses of such sale.

That upon the payment of the purchase price by the purchaser or purchasers of said property, lands, premises, reservoir, water rights, canals, works, structures, and irrigation system such Special Master shall execute and deliver a deed conveying the property purchased to such purchaser or purchasers, or his or their successors or assigns; and upon the execution and delivery of such deed, and the expiration of the period of redemption as hereinafter fixed, the grantee thereunder shall be let into possession of the premises and property conveyed, and shall be entitled to hold, enjoy and possess said premises and property, and all the rights and privileges, immunities and franchises thereunto appertaining, free and clear of any lien or liens of any of the defendants herein.

7. That in case the proceeds of said sale shall prove to be insufficient to provide for the payment in full of the sums hereinbefore mentioned and described, then such Special Master shall find and report to this Court the amount of such deficiency or deficiencies, and, such report being confirmed by this Court, the cross-complainant Maney Brothers & Company shall be entitled to judgment therefor against the defendants Crane Creek Irrigation Land & Power Company, E. D. Ford, A. G. Butterfield, and R. C. McKinney, and to have execution issued thereon pursuant to the rules and practice of this Court.

8. That the provisions of the contracts, dated August 22, 1910, between Crane Creek Irrigation Land & Power Company and the said Crane Creek Irriga-

tion District and Sunnyside Irrigation District, to the effect that in the event said Crane Creek Irrigation Land & Power Company shall not increase the storage capacity of said reservoir to 70,617 acre feet within five years from the delivery and acceptance of the proportion of said irrigation system which said contracts provide shall be delivered and conveyed to said districts, respectively, and that, in such event, said company shall convey to said districts certain additional percentage of interest, insofar as the same are still in force and effect and have not been modified or changed by supplemental contracts or agreements between said parties, shall be binding upon the purchaser or purchasers, their grantees, successors, or assigns, under any sale or sales had in satisfaction of the lien or claim of said Maney Brothers & Company; and the purchaser or purchasers under said sale shall take only such interest in said reservoir, canals, water rights and irrigation system as said Crane Creek Irrigation Land & Power Company may have or be entitled to hold and retain under existing contracts between said Crane Creek Company and said districts, entered into prior to the filing of the cross-bill of said Maney Brothers & Company.

It is further ordered, adjudged and decreed, that the enforcement by the plaintiff Portland Wood Pipe Company of the terms of this decree relating to its claim shall be without prejudice to the right of the cross-complainant Maney Brothers & Company hereunder; and likewise the enforcement of the terms

and provisions of this decree relative to the rights and claim of said Maney Brothers & Company shall be without prejudice to the rights of said Portland Wood Pipe Company; and said parties may separately and severally proceed hereunder for the enforcement of their respective rights and claims.

It is further ordered, adjudged and decreed, that all property, lands, premises, water rights, irrigation works, canals, and structures and interests therein that may be sold under the provisions of this decree, whether in satisfaction of the claim of the Portland Wood Pipe Company or the claim of said Maney Brothers & Company, shall be subject to redemption by qualified redemptioners under the laws of the State of Idaho within three months from the date of confirmation of such sale, which redemption period is so fixed at three months upon the express agreement of the parties hereto interested in said decree, that the same is a reasonable and proper period for redemption, in view of the nature and character of the property to be sold and the circumstances of the parties; that such redemption shall be made by payment of the amount required for redemption, computed according to the practice of this court. Further provisions relative to such redemption may be made in the order of confirmation of sale.

It is further ordered, adjudged and decreed, that Slick Brothers Construction Company, Limited, one of the cross-complainants herein, take nothing by the cross-bill, and said cross-bill is hereby dismissed; and

the defendants to said cross-bill shall be entitled to judgment against said Slick Brothers Construction Company, Limited, for their costs incurred in connection therewith, to be taxed as provided by statute and the rules of Court.

Any party may apply for further directions at the foot of this decree.

Dated June 12, 1915.

F. S. DIETRICH,
District Judge.

Endorsed: Filed June 12, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD,

WM. R. COMERFORD, JAMES M. MAGEE,
C. A. SMITH, J. L. SMITH, GEO. F. SMITH,
CLAUDE F. SMITH, A. T. SCHWAB, A. L.
CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COM-
PANY, Limited, a corporation,

Cross-Complainant,

VS.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, et al.,

Cross-Defendants,

AND

MANEY BROTHERS & CO., (a co-partnership con-
sisting of J. W. Maney, John Maney, Herbert G.
Wells and E. J. Wells),

Cross-Complainant,

VS.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, CRANE CREEK IR-
RIGATION DISTRICT, a corporation, SUNNY-
SIDE IRRIGATION DISTRICT, a corporation,
IDAHO NATIONAL BANK, a corporation, C. R.
SHAW WHOLESALE COMPANY, a corporation,
UTAH FIRE CLAY COMPANY, a corporation,
PORTLAND WOOD PIPE COMPANY, a corpor-
ation, SLICK BROTHERS CONSTRUCTION
COMPANY, Limited, a corporation, PETE
MARCH, G. A. HEMAN, J. M. PINCKARD, F.
A. SQUIER, S. C. COMERFORD, JIM MIRE-
HOUSE, GUY COMERFORD, WM. R. COMER-

FORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, GEO. C. CATER, E. D. FORD, A. G. BUTTERFIELD, and R. C. McKINNEY,

Cross-Defendants.

In Equity. No. 511.

ASSIGNMENT OF ERRORS.

The defendant, Crane Creek Irrigation District, above named, files the following assignment of errors upon which it will rely upon its prosecution of its appeal from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in the above entitled cause:

I.

The United States District Court for the District of Idaho, Southern Division, erred in ordering, adjudging and decreeing that the plaintiff, Portland Wood Pipe Company, is entitled to and has a first charge and lien for the security and payment of the sums of money adjudged to be due plaintiff from the defendant, Slick Brothers Construction Company, to-wit, \$9733.94, with interest thereon at 8 per cent. per annum from June 24, A. D. 1914, recording and attorneys fees aggregating in the sum of \$11,244.30, with costs, upon all the right, title and interest of this defendant, Crane Creek Irrigation District in and to the property in said decree particularly described as constituting the irrigation system constructed by the defendant Crane Creek Irrigation Land & Power Company for this defendant, and the

defendant, Sunnyside Irrigation District, and all the water rights, permits, rights-of-way, and appropriations connected with and necessary to the use of said system. For a particular description of said system and property, reference is hereby made to said decree.

II.

The said Court erred in ordering, adjudging and decreeing that the said plaintiff, the Portland Wood Pipe Company was entitled to and had a mechanic's lien under the laws of the State of Idaho, which was a charge and lien upon the interest of this defendant in the irrigation system constructed by the Crane Creek Irrigation Land & Power Company for this defendant, and the defendant Sunnyside Irrigation District, and all the water rights, permits, rights-of-way and appropriations connected with and necessary to the use of said system. For a particular description of said system and property reference is hereby made to said decree.

III.

The said Court erred in deciding and adjudging as matter of law that material-men furnishing supplies and material for the construction of an irrigation system for the use and benefit of irrigation districts, such as this defendant, were entitled to liens as security for the value of such material, against the irrigation system, and it erred in deciding and adjudging that the laws of the State of Idaho granted or permitted the charging of such property with mechanics' or material men's liens.

IV.

The said Court erred in ordering, adjudging and decreeing that the said irrigation system and property be sold as an entirety and in one parcel; and in ordering, adjudging and decreeing that the said property was subject to execution or foreclosure sale.

V.

The said Court erred in adjudging and decreeing that the entire system, including its water rights, permits, rights-of-way and appropriations connected with and necessary to its use should be sold in one parcel, without valuation, or appraisement, and without provision for the application of the proceeds of the sale of the interest of the Crane Creek Irrigation Land & Power Company in the system and property, if any there should be after satisfaction of the Maney Brothers mortgage lien, being first applied in satisfaction of plaintiff's claim before resort should be had to the interests of this defendant.

VI.

The Court erred in not dismissing plaintiff's bill of complaint as against this defendant, and its interest and property right in the irrigation system hereinbefore in the pleadings and decree mentioned.

Wherefore, this defendant, Crane Creek Irrigation District, prays that the said judgment and decree of the District Court of the United States for the District of Idaho, Southern Division, be reversed, with directions to dismiss the bill of complaint of the

Portland Wood Pipe Company as against this defendant, and for costs.

C. S. VARIAN,
ED. R. COULTER,

Solicitors for Defendant, Crane Creek Irrigation District.

Endorsed: Filed July 8, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH,

CLAUDE F. SMITH, A. T. SCHWAB, A. L.
CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COM-
PANY, Limited, a corporation,

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, et al.,

Cross-Defendants.

AND

MANEY BROTHERS & CO., (a co-partnership con-
sisting of J. W. Maney, John Maney, Herbert G.
Wells and E. J. Wells),

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, CRANE CREEK
IRRIGATION DISTRICT, a corporation, SUN-
NYSIDE IRRIGATION DISTRICT, a corpora-
tion, IDAHO NATIONAL BANK, a corporation,
C. R. SHAW WHOLESALE COMPANY, a cor-
poration, UTAH FIRE CLAY COMPANY, a cor-
poration, PORTLAND WOOD PIPE COMPANY,
a corporation, SLICK BROTHERS CONSTRUC-
TION COMPANY, Limited, a corporation,
PETE MARCH, G. A. HEMAN, J. M. PINCK-
ARD, F. A. SQUIER, S. C. COMERFORD, JIM
MIREHOUSE, GUY COMERFORD, WM. R.
COMERFORD, JAMES M. MAGEE, C. A.

SMITH, J. L. SMITH, GEO. F. SMITH,
CLAUDE F. SMITH, A. T. SCHWAB, A. L.
CHENOWETH, GEO. C. CATER, E. D. FORD,
A. G. BUTTERFIELD, and R. C. McKINNEY,
Cross-Defendants.

In Equity. No. 511.

ASSIGNMENT OF ERRORS.

The defendant, Sunnyside Irrigation District, above named, files the following assignment of errors upon which it will rely upon its prosecution of its appeal from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in the above entitled cause:

I.

The United States District Court for the District of Idaho, Southern Division, erred in ordering, adjudging and decreeing that the plaintiff, Portland Wood Pipe Company, is entitled to and has a first charge and lien for the security and payment of the sums of money adjudged to be due plaintiff from the defendant, Slick Brothers Construction Company, to-wit, \$9733.94, with interest thereon at 8 per cent. per annum from June 24, 1914, recording and attorneys' fees aggregating in the sum of \$11,244.30, with costs, upon all the right, title and interest of this defendant Sunnyside Irrigation District, in and to the property in said decree particularly described as constituting the irrigation system constructed by the defendant, Crane Creek Irrigation Land & Power Company, for this defendant, and the defend-

ant, Crane Creek Irrigation District, and all the water rights, permits, rights-of-way and appropriations connected with and necessary to the use of said system. For a particular description of said system and property reference is hereby made to said decree.

II.

The said Court erred in ordering, adjudging and decreeing that the said plaintiff, Portland Wood Pipe Company, was entitled to and had a mechanic's lien under the laws of the State of Idaho, which was a first charge and lien upon the interest of this defendant in the irrigation system constructed by the Crane Creek Irrigation Land & Power Company for this defendant and the defendant, Crane Creek Irrigation District, and all the water rights, permits, rights-of-way, and appropriations connected with and necessary to the use of said system. For a particular description of said system and property reference is hereby made to said decree.

III.

The said Court erred in deciding and adjudging as matter of law that material-men furnishing supplies and material for the construction of an irrigation system for the use and benefit of irrigation districts, such as this defendant, were entitled to liens as security for the value of such material against the irrigation system, and it erred in deciding and adjudging that the laws of the State of Idaho granted or permitted the charging of such property with mechanic's or material-men's liens.

IV.

The said Court erred in ordering, adjudging and decreeing that the said irrigation system and property be sold as an entirety and in one parcel; and in ordering, adjudging and decreeing that the said property was subject to execution or foreclosure sale.

V.

The Court erred in adjudging and decreeing that the entire system, including its water-rights, permits, rights-of-way and appropriations connected with and necessary to its use should be sold in one parcel without valuation and without provision for the application of the proceedings of the sale of the interest of the Crane Creek Irrigation Land & Power Company in the system and property, if any there should be, after satisfaction of the Maney Brothers mortgage lien, being first applied in satisfaction of plaintiff's claim before resort should be had to the interests of this defendant.

VI.

The Court erred in not dismissing plaintiff's bill of complaint as against this defendant and its interest and property right in the irrigation system hereinbefore in the pleadings and decree mentioned.

Wherefore, this defendant, Sunnyside Irrigation District, prays that the said judgment and decree of the District Court of the United States for the District of Idaho, Southern Division, be reversed, with directions to dismiss the bill of complaint of the

Wood Pipe Company as against this defendant, and for costs.

C. S. VARIAN,
ED. R. COULTER,

Solicitors for Defendant Sunnyside Irrigation District.

Endorsed: Filed July 8, 1915. A. L. Richardson, Clerk.

JOURNAL ENTRY.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Thursday, the 8th day of July, 1915.

Present: Hon. Frank S. Dietrich, Judge.
PORTLAND WOOD PIPE COMPANY,

vs.

SLICK BROS. CONSTRUCTION COMPANY, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, et al.

No. 511.

Now comes the defendants, the Crane Creek Irrigation District and the Sunnyside Irrigation District by their solicitors and in open court severally present their petitions for an allowance of an appeal from the decree of this court made and filed in this cause on the 12th day of June, 1915, to the Circuit Court of Appeals for the Ninth Circuit, and for fix-

ing of the amount of a bond in each case to act as a supersedeas, and it appearing that said petitions are in form and that each of the said defendants has presented and filed its assignment of errors, it is ordered that appeals in each case be and the same is hereby allowed, and the bond in each case is fixed in the sum of \$3000.00 to act as a supersedeas.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation,

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, et al.,

Cross-Defendants,

AND

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells),

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, UTAH FIRE CLAY COMPANY, a corporation, PORTLAND WOOD PIPE COMPANY, a corporation, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation. PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L.

CHENOWETH, GEO. C. CATER, E. D. FORD,
A. G. BUTTERFIELD, and R. C. McKINNEY,
Cross-Defendants.

In Equity. No. 511.

PETITION FOR ALLOWANCE OF APPEAL
WITH SUPERSEDEAS.

The above named defendant, Crane Creek Irrigation District, a corporation, conceiving itself aggrieved by the decree made and entered in the above entitled cause on the 12th day of June, A. D. 1915, whereby it was ordered, adjudged and decreed that the defendant, Portland Wood Pipe Company, a corporation, plaintiff herein, was entitled to and had a first lien for the security and payment to it of the sum of \$9733.94, with interest thereon at the rate of 8 per cent. per annum from June 24, 1914, with the recording fees and attorneys fees aggregating in the sum of \$11,244.30 upon all the right, title and interest of this defendant, Crane Creek Irrigation District, in and to the property in said decree particularly described, and constituting the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, for this defendant, and the defendant, Sunnyside Irrigation District, and all the water rights, permits, rights-of-way, appropriations connected with and necessary to the use of said system, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons particularly set forth in its assignments of errors which is filed herewith; and defendant prays that said appeal may be allowed, and

that an order be made fixing the amount of security which it shall give for costs and as a supersedeas, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal, and that a transcript of the record, papers and proceedings upon which said decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

C. S. VARIAN,

ED. R. COULTER,

Solicitors for Defendant Crane Creek Irrigation
District.

ORDER ALLOWING APPEAL.

On motion of E. R. Coulter and C. S. Varian, Esqs., solicitors for defendant, Crane Creek Irrigation District, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of \$3000.00, the same to act as a supersedeas and also as a bond for costs and damages on appeal.

FRANK S. DIETRICH,

District Judge.

Done in open Court this 8th day of July, A. D.
1915.

Endorsed: Filed July 8, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, MANEY BROTHERS & COMPANY, a co-partnership, UTAH FIRE CLAY COMPANY, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation,

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, et al.,

Cross-Defendants.

AND

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells),

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, CRANE CREEK
IRRIGATION DISTRICT, a corporation, SUN-
NYSIDE IRRIGATION DISTRICT, a corpora-
tion, IDAHO NATIONAL BANK, a corporation,
C. R. SHAW WHOLESALE COMPANY, a cor-
poration, UTAH FIRE CLAY COMPANY, a cor-
poration, PORTLAND WOOD PIPE COMPANY,
a corporation, SLICK BROTHERS CONSTRUC-
TION COMPANY, Limited, a corporation,
PETE MARCH, G. A. HEMAN, J. M. PINCK-
ARD, F. A. SQUIER, S. C. COMERFORD, JIM
MIREHOUSE, GUY COMERFORD, WM. R.
COMERFORD, JAMES M. MAGEE, C. A.
SMITH, J. L. SMITH, GEO. F. SMITH,
CLAUDE F. SMITH, A. T. SCHWAB, A. L.
CHENOWETH, GEO. C. CATER, E. D. FORD,
A. G. BUTTERFIELD, and R. C. McKINNEY,

Cross-Defendants.

In Equity. No. 511.

PETITION FOR ALLOWANCE OF APPEAL
WITH SUPERSEDEAS.

The above named defendant, Sunnyside Irrigation

District, a corporation, conceiving itself aggrieved by the decree made and entered in the above entitled cause on the 12th day of June, A. D. 1915, whereby it was ordered, adjudged and decreed that the defendant, Portland Wood Pipe Company, a corporation, plaintiff herein, was entitled to and had a first lien for the security and payment to it of the sum of \$9733.94, with interest thereon at the rate of 8 per cent. per annum from June 24, 1914, with recording fees and attorneys fees aggregating in the sum of \$11,244.30, and costs of suit, upon all the right, title and interest of this defendant, Sunnyside Irrigation District, in and to the property in said decree particularly described, and constituting the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, for this defendant, and the defendant, Crane Creek Irrigation District, and all the water rights, permits, rights-of-way, appropriations connected with and necessary to the use of said system, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons particularly set forth in its assignments of error which is filed herewith; and the defendant prays that said appeal may be allowed, and that an order be made fixing the amount of security which it shall give for costs and as a supersedeas, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal, and that a transcript of the record, papers and proceedings upon which said decree was

made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

C. S. VARIAN,
ED. R. COULTER,

Solicitors for Defendant Sunnyside Irrigation
District.

ORDER ALLOWING APPEAL.

On motion of E. R. Coulter and C. S. Varian, Esqs., solicitors for defendant, Sunnyside Irrigation District, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree herein be, and the same is, hereby allowed, and that a certified transcript of the record, testimony, exhibits and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of \$3000.00, the same to act as a superseas and also as a bond for costs and damages on appeal.

FRANK S. DIETRICH,
District Judge.

Done in open court this 8th day of July, A. D. 1915.

Endorsed: Filed July 8, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a corpora-
tion, *Plaintiff,*

vs.

SLICK BROTHERS CONSTRUCTION COM-
PANY, Limited, a corporation, CRANE CREEK
IRRIGATION LAND & POWER COMPANY, a
corporation, CRANE CREEK IRRIGATION
DISTRICT, a corporation, SUNNYSIDE IRRI-
GATION DISTRICT, a corporation, IDAHO NA-
TIONAL BANK, a corporation, C. R. SHAW
WHOLESALE COMPANY, a corporation, MA-
NEY BROTHERS & COMPANY, a co-partner-
ship, UTAH FIRE CLAY COMPANY, a corpo-
ration, PETE MARCH, G. A. HEMAN, J. M.
PINCKARD, F. A. SQUIER, S. C. COMER-
FORD, JIM MIREHOUSE, GUY COMERFORD,
WM. R. COMERFORD, JAMES M. MAGEE,
C. A. SMITH, J. L. SMITH, GEO. F. SMITH,
CLAUDE F. SMITH, A. T. SCHWAB, A. L.
CHENOWETH, and GEO. C. CATER,

Defendants,

AND

SLICK BROTHERS CONSTRUCTION COM-
PANY, Limited, a corporation,

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER
COMPANY, a corporation, et al.,

Cross-Defendants,

AND

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells),

Cross-Complainant,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, IDAHO NATIONAL BANK, a corporation, C. R. SHAW WHOLESALE COMPANY, a corporation, UTAH FIRE CLAY COMPANY, a corporation, PORTLAND WOOD PIPE COMPANY, a corporation, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUDE F. SMITH, A. T. SCHWAB, A. L. CHENOWETH, GEO. C. CATER, E. D. FORD, A. G. BUTTERFIELD, and R. C. McKINNEY,

Cross-Defendants.

In Equity. No. 511.

PRAECIPE FOR RECORD.

The Clerk of the above entitled District Court is hereby directed to transcribe for the joint record on appeal herein by Crane Creek Irrigation District, a corporation, and Sunnyside Irrigation Dis-

trict, a corporation, the following pleadings, exhibits, and parts thereof, opinion of the Court, final decree and statement of the evidence, and transcribing only the portions of the exhibits hereinafter mentioned as hereinafter stated.

1. Bill of Complaint.

2. Answer thereto of Crane Creek Irrigation District.

3. Answer thereto of the Sunnyside Irrigation District.

4. Contract of August 22, 1910, of the Crane Creek Irrigation Land & Power Company and Sunnyside Irrigation District Exhibit "B".

5. Contract of date October 3, 1911, extending time to May 1, 1912, Exhibit "M".

6. Contract between the same parties of date April 19, 1913, extending time to April 15, 1914, Exhibit "O".

7. Contract of date April 19, 1913, providing for joint surety bond to both districts, Exhibit "T".

8. Contract of date of August 22, 1910, between the Crane Creek Irrigation Land & Power Company and Sunnyside Irrigation District, Exhibit "C".

9. Contracts between the Crane Creek Irrigation Land & Power Company and Slick Brothers Construction Company, Limited, Slick Bros. Exhibits 37, 38 and 39, omitting the specifications of such contracts annexed thereto.

10. Contract between Slick Brothers Construction Company, Limited, and Portland Wood Pipe Company, Plaintiff's Exhibit 1-A and 1-B.

11. Deeds from the Crane Creek Irrigation Land & Power Company to the Crane Creek Irrigation District numbered 1 to 13 inclusive, and deeds from the Crane Creek Irrigation Land & Power Company to the Sunnyside Irrigation District numbered 1 to 13 inclusive, with the date of each deed except the second and third paragraphs thereof embracing the granting clause and the description of the property conveyed.

12. Statement of the evidence of the witnesses E. D. Ford and E. R. Coulter.

13. Opinion of the Court.

14. The final decree.

15. Petition for appeal and order in pursuance thereof.

16. Order made in open court allowing appeals.

17. Assignment of errors by Crane Creek Irrigation District.

18. Assignment of errors by Sunnyside Irrigation District.

19. Bond of Crane Creek Irrigation District on appeal.

20. Bond of Sunnyside Irrigation District on appeal.

Respectfully,

C. S. VARIAN,

E. R. COULTER,

Solicitors for Defendants Crane Creek Irrigation District and Sunnyside Irrigation District.

Dated this 8th day of July, A. D. 1915.

Service with copy admitted this 8th day of July,
A. D. 1915.

RICHARDS & HAGA,
Solicitors for Plaintiff.

Endorsed: Filed July 8, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

BOND OF CRANE CREEK IRRIGATION
DISTRICT.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PORTLAND WOOD PIPE COMPANY, a Corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a Corporation, CRANE CREEK IRRIGATION DISTRICT, a Corporation, SUNNYSIDE IRRIGATION DISTRICT, a Corporation, et al.,
Defendants.

IN EQUITY, No. 511.

UNDERTAKING ON APPEAL.

Know All Men by These Presents, That we, Crane Creek Irrigation District, a corporation, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the Portland Wood Pipe Company, a corporation, in the sum of Three Thousand (\$3000.00) Dollars, lawful money of the United States of America, to be paid to the aforesaid Portland Wood Pipe Company, a

corporation, its successors or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, our, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of July, A. D. 1915.

Whereas, the above named Crane Creek Irrigation District, a corporation, defendant above named, obtained in open court an order allowing its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree in favor of the above named Portland Wood Pipe Company, a corporation, against the said defendant, rendered in said District Court on the 12th day of June, A. D. 1915, to reverse the said decree, and to stay the execution thereof pending the said appeal; and,

Whereas, the said United States District Court has fixed the sum of a bond on said appeal as security for all costs and damages, and to act as a supersedeas in the sum of Three Thousand Dollars (\$3000.00);

Now, Therefore, the condition of this obligation is such that if the said Crane Creek Irrigation District shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it, including all just damages for delay and costs and interest on said appeal, if it fails to make its said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

In Witness Whereof, the parties aforesaid have caused their corporate names to be hereunto subscribed, and their corporate seals attached, by the proper officers in that behalf duly authorized.

(Seal) CRANE CREEK IRRIGATION DISTRICT,
Principal,
By Wm. Themel, President.

(Seal) AMERICAN SURETY COMPANY OF
NEW YORK,
By W. E. McKell, Resident Vice President.

Attest: Frances Merrill,
Resident Assistant Secretary.

B. S. Varian, Resident Agent American Surety
Co. of New York.

Attest: Daisy Dasch, Secretary.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety, this 7th day of August, A. D. 1915.

FRANK S. DIETRICH,
District Judge.

STATUTORY AFFIDAVIT FOR CORPORATE
SURETY, IDAHO.

State of Utah,
County of Salt Lake,—ss.

On the 29th day of July, 1915, personally appeared before me, a Notary Public in and for the county and State aforesaid, W. E. McKell, to me known to be a Resident Vice President of the American Surety Company of New York, who, being by me duly sworn,

did depose and say: That he resided in the City of Salt Lake City, State of Utah; that he is Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of trustees of said corporation; and that he signed his name thereto by like order; that said corporation has complied with Chapter Eleven of the Idaho Revised Codes and all other laws of the State of Idaho relating to surety companies and has also complied with the Act of Congress approved August Thirteenth, A. D. 1894, entitled: "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," as amended March 23, 1910; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law; and the said W. E. McKell further said that he was acquainted with Frances Merrill and knew him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said Frances Merrill subscribed to the said instrument is in the genuine handwriting of the said Frances Merrill and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said W. E. McKell, Resident Vice President; Affiant further says that the Insurance Commissioner of the State of Idaho, whose address is Boise, Idaho, has been appointed attorney

upon whom process for the State of Idaho may be served according to law.

W. E. McKELL.

Subscribed and sworn to before me this 29th day of July, 1915.

(Seal) CORA BEATTY, Notary Public.

Endorsed: Filed August 16, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

BOND OF SUNNYSIDE IRRIGATION
DISTRICT.

In the District Court of the United States for the District of Idaho, Southern Division.

PORTLAND WOOD PIPE COMPANY, a corporation,
Plaintiff,

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, Limited, a corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a corporation, et als.,
Defendants.

IN EQUITY. No. 511.

Undertaking on Appeal.

Know All Men by These Presents, That we, Sunnyside Irrigation District, a corporation, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the Portland Wood Pipe Company, a corporation, in the sum of Three Thousand (\$3000.00) Dollars, lawful money of the United States of America, to be paid to

the aforesaid Portland Wood Pipe Company, a corporation, its successors or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, our, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of July, A. D. 1915.

Whereas, The above named Sunnyside Irrigation District, a corporation, defendant above named, obtained in open court an order allowing its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree in favor of the above named Portland Wood Pipe Company, a corporation, against the said defendant, rendered in said District Court on the 12th day of June, A. D. 1915, to reverse the said decree, and to stay the execution thereof pending in said appeal; and,

Whereas, The said United States District Court has fixed the sum of a bond on said appeal as security for all costs and damages, and to act as a supersedeas in the sum of Three Thousand (\$3000.00) Dollars,

Now Therefore, The condition of this obligation is such that if the said Sunnyside Irrigation District shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it, including all just damages for delay and costs and interest on said appeal, if it fails to make its said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

In Witness Whereof, The parties aforesaid have caused their corporate names to be hereunto subscribed, and their corporate seals attached, by the proper officers in that behalf duly authorized.

(Seal) SUNNYSIDE IRRIGATION DISTRICT,
Principal.

Attest: By August Brockman, President.

E. R. Coulter, Secretary.

(Seal) AMERICAN SURETY COMPANY OF
NEW YORK,

By W. E. McKELL,
Resident Vice President.

Attest: Frances Merrill,
Resident Assistant Secretary.

B. S. Varian, Resident Agent American Surety
Co., N. Y.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety this 7th day of August, A. D. 1915.

FRANK S. DIETRICH,
District Judge.

STATUTORY AFFIDAVIT FOR CORPORATE
SURETY, IDAHO.

State of Utah,
County of Salt Lake,—ss.

On the 29th day of July, 1915, personally appeared before me, a Notary Public in and for the county and state aforesaid, W. E. McKell to me known to be a Resident Vice President of the American Surety

Company of New York, who being by me duly sworn did depose and say: That he resided in the City of Salt Lake City, State of Utah; that he is Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that he signed his name thereto by like order; that said corporation has complied with Chapter Eleven of the Idaho Revised Codes and all other laws of the State of Idaho relating to surety companies and has also complied with the Act of Congress approved August Thirteenth, A. D. 1894, entitled: "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," as amended March 23, 1910; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law; and the said W. E. McKell further said that he was acquainted with Frances Merrill and knew him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said Frances Merrill subscribed to the said instrument is in the genuine handwriting of the said Frances Merrill and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said W. E. McKell, Resident Vice President; affiant further says that the Insurance Commissioner of the State of

Idaho, whose address is Boise, Idaho, has been appointed Attorney upon whom process for the State of Idaho may be served according to law.

W. E. McKELL.

Subscribed and sworn to before me this 29th day of July, 1915.

(Seal) CORA BEATTY, Notary Public.

Endorsed: Filed August 16, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest: (Seal) A. L. RICHARDSON,
Clerk.

By PEARL E. ZANGER,
Deputy.

CRANE CREEK IRRIGATION DISTRICT, a corporation, and SUNNYSIDE IRRIGATION DISTRICT, a corporation,

Plaintiffs in Error,

vs.

PORTLAND WOOD PIPE COMPANY, a corporation, et al.,
Defendants in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 249 inclusive contain true and correct copies of the Complaint, Answer of Crane Creek Irrigation District, Answer of Sunnyside Irrigation District, Statement of the Evidence with the Exhibits attached, Opinion of the Court, Final Decree, Petition for Appeal and Order in pursuance thereof, Order made in open Court allowing Appeal, Assignment of Errors by Crane Creek Irrigation District, Assignment of Errors by Sunnyside Irrigation District, Bond of Crane Creek Irrigation District, Bond of Sunnyside Irrigation District, Return to Record and Clerk's certificate, in the above entitled cause which, together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs of the record herein amounts to the sum of \$395.00 and that the same has been paid by the appellants.

Witness my hand and the seal of said court, affixed at Boise, Idaho, this 20th day of August, 1915.

(Seal) A. L. RICHARDSON,
Clerk.

By PEARL E. ZANGER,
Deputy.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PORTLAND WOOD PIPE CO., a Corporation,
et al., *Appellee,*

VS.

CRANE CREEK IRRIGATION DISTRICT, a
Corporation, and SUNNYSIDE IRRIGATION
DISTRICT, a Corporation, *Appellants.*

**SUPPLEMENTAL TRANSCRIPT
OF RECORD**

*Upon Appeal from the U. S. District Court for the
District of Idaho, Southern Division.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

PORTLAND WOOD PIPE CO., a Corporation,
et al., *Appellee,*

vs.

CRANE CREEK IRRIGATION DISTRICT, a
Corporation, and SUNNYSIDE IRRIGATION
DISTRICT, a Corporation, *Appellants.*

SUPPLEMENTAL TRANSCRIPT OF RECORD.

*Upon Appeal from the U. S. District Court for the
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PORTLAND WOOD PIPE CO., a Corporation,
et al., *Appellee,*

vs.

CRANE CREEK IRRIGATION DISTRICT, a
Corporation, and SUNNYSIDE IRRIGATION
DISTRICT, a Corporation, *Appellants.*

SUPPLEMENTAL TRANSCRIPT OF RECORD.

*Upon Appeal from the U. S. District Court for the
District of Idaho, Southern Division.*

“The paper marked ‘Defendants’ Sunnyside and Crane Creek Irrigation Districts’ Exhibit B, is the original contract entered into on the date therein mentioned, between Crane Creek Irrigation Land and Power Company, and Sunnyside Irrigation District.”

The exhibit referred to as “Sunnyside and Crane Creek Irrigation Districts’ Exhibit B” is in words and figures following, except that the plans and specifications thereto attached have been omitted there-

from, and we ask that the Court make an order transmitting and requiring the original plans and specifications attached to said original contract "Exhibit B" to be forwarded with and as a part of the record on appeal in the above entitled action.

This Agreement, made and entered into in duplicate this 22d day of August, 1910, by and between the Crane Creek Irrigation Land and Power Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business at Weiser, Washington County, Idaho, (hereinafter called the "Company") the party of the first part, and the Sunnyside Irrigation District, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business in said district in Washington County, State of Idaho, (hereinafter called the "District"), the party of the second part,

Witnesseth: That, whereas, the Company has acquired the right to store, impound, divert and distribute for irrigation, power and domestic purposes certain waters of Crane Creek, in Washington County, Idaho, and the tributaries thereof, and the flood waters flowing therein, under certain water rights and water appropriations hereinafter more particularly described, and,

Whereas, The Company is also the owner of a partially constructed irrigation system, consisting of a dam site, reservoir, dams, canals, and other structures being constructed for the purpose of storing,

impounding, diverting and distributing, under the water rights and water appropriations above referred to, the said waters of Crane Creek and its tributaries, and is also the owner of certain water rights of way for said reservoir, dams, canals and other structures being constructed and about to be constructed and situate in the County of Washington, State of Idaho, and,

Whereas, the District is a corporation duly organized under the laws of the State of Idaho, and has full power and authority to acquire and hold, appropriate and maintain reservoirs, canals, dams, aqueducts, ditches, pipe lines, tunnels, flumes and other structures and irrigation works for storing, impounding, diverting, carrying and distributing water for irrigation purposes to lands and holders of lands within the boundaries of said Sunnyside Irrigation District, in accordance with the statutes of Idaho, in such cases made and provided; and,

Whereas, for the consideration hereinafter stated, the Company hereby agrees to sell and agrees to convey, and the District hereby agrees to purchase and agrees to receive conveyance of that certain portion of said water rights, water appropriations, and rights of way more particularly hereinafter described, and that portion of such works and irrigation system as constructed, as the times and in the manner hereinafter particularly set forth; and the Company for said consideration, hereby agrees to convey to the District together with said portion of said water rights, water appropriations and rights

of way, that certain portion of the reservoir, dams, canals, pipe lines, flumes, laterals and other works composing such irrigation system completed within the time and in the manner hereinafter particularly set forth;

Now, Therefore, in consideration of the premises, and in consideration of the sum of Ten Dollars (\$10.00) by each of the parties hereto to the other in hand paid, and in consideration of the mutual covenants and agreements herein contained to be kept and performed by the parties hereto, respectively, and for the purpose of evidencing an understanding and agreement between the parties hereto, the said parties have agreed and hereby do agree as follows, to-wit:

I.

That said reservoir, dams, pipe lines, flumes, canals, laterals and other structures forming part of said irrigation system, all situated in Washington County, Idaho, shall when completed substantially conform to the plans and specifications prepared by A. J. Wiley and Z. N. Vaughn, hereto attached and made a part of this contract, and such additional plans and specifications as may hereafter be approved by the parties in the manner hereinafter provided.

II.

The property to be conveyed is:

(a) An undivided thirty-five and twenty-six one-hundredths per cent. (35.26%) interest of, in and to

that certain permit No. 1720, issued by the State Engineer of the State of Idaho, under date of December 16, 1905, to one Edwin D. Ford, and recorded in Book 6 at page 1729 of the records in said State Engineer's office at Boise, Idaho, and heretofore conveyed to the Company, together with a like proportion of all the water thereby appropriated and all rights acquired under said permit; also thirty-five and twenty-six one-hundredths per cent. (35.26%) of the right of all flowage through the Northwest quarter of the Northeast quarter and the North half of the Northwest quarter of Section 19, Township 12 North of Range 2 West of the Boise Meridian, in Idaho; also thirty-five and twenty-six one-hundredths per cent. (35.26%) of the right of flowage through the Northeast quarter of Section 24 in Township 12, North of Range 3 West of the Boise Meridian, in Idaho, heretofore conveyed to the Company by Edwin D. Ford and Hortense A. Ford, under date of May 9, 1910.

(b) An undivided thirty five and twenty-six hundredths per cent. (35.26%) interest of, in and to all the singular such rights of way for canals, flumes and laterals as may be used in common by said District, the Company and its other grantees, acquired by the Company by purchase or by filing maps thereof as required by the Regulations of the General Land Office of the United States, and the Acts of Congress in relation thereto, including an undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to said reservoir site as

described in that certain indenture, dated May 9, 1910, between Edwin D. and Hortense A. Ford and the Company, which said indenture is of record in Book of Deeds at Page of the Records in the office of the County Recorder of Washington County, Idaho.

(c) An undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to all canals, pipe lines, flumes and aqueducts situate wholly without the boundaries of said irrigation district, as shown upon the plat attached hereto and used in connection with said district, or appurtenant thereto.

(d) All and singular the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of said irrigation district, as appear from the plat hereto attached, subject to the conditions hereinafter mentioned, including all the rights of way for the same now owned or hereafter to be acquired by the Company.

III.

Modifications in the plans and specifications above referred to may be made with the consent of the Engineer of the Company, and the Engineer of the District, and where they cannot agree, then by an engineer by them jointly selected, but which third engineer shall in nowise be connected with the Company, the District, or with any contractor or sub-contractor on the work; provided that no modifications of such plans or specifications shall be made other than such as may be found necessary because of the unforeseen

character of the material to be excavated, or conditions to be overcome; and provided that no modifications of such plans or specifications shall be made except such as shall improve the system and works and especially that part of the same affected by such modifications, and provided further that any such modifications shall not invalidate any bond or bonds as hereinafter provided for.

IV.

That the capacity of the reservoir now in process of construction by the Company shall when final conveyance is made hereunder be not less than fifty thousand (50,000) acre feet of water, and when finally completed said reservoir shall have a capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet of water.

V.

The main canal, pipe lines and flumes carrying the water from such reservoir to the place of use by the District and each main lateral therefrom shall be of the size and have the fall prescribed in the plans and specifications hereto attached.

VI.

The Company agrees to have all the works above described completed by the first day of May, 1912, and the dam to be completed within one year from the date of this contract, and to be of a sufficient capacity to impound all of the water contracted for by the Crane Creek and Sunnyside Irrigation Districts.

VII.

That upon the execution of this agreement, the Company agrees to convey to the District, the receipt of which is hereby acknowledged, an undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to said water right and reservoir site, excepting the right of possession thereof which is to be held until final conveyance, as herein provided; and upon the completion of any portion of said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the District such completed portion with the same proportion of the rights of way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest of, in and to said water rights, appropriations, reservoir sites, rights of way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances, contemplated in this agreement and agreed to be sold and conveyed hereunder, together with the possession thereof to the district; Provided, that within twenty (20) days after the signing of this agreement, and upon the delivery by the Company to the District of the bonds hereinafter provided for, the District will deliver to the Company its coupon bonds of the face value of One Hundred Thousand Dollars (\$100,000.00) and, upon the receipt of the conveyance above referred to, after each monthly estimate, will deliver its coupon bonds to the Company at face value to an amount equal to such part of the entire

bond issue of said District, to be sold and delivered hereunder, as the construction portion of said works of said Company bears to the entire works to be constructed for the use and benefit of said District.

VIII.

The District in consideration of the covenants and agreements herein contained to be kept and performed by the Company, and in full payment for said water rights, irrigation system, reservoir, dams, canals, aqueducts, pipe lines, flumes and other structures forming a part of such irrigation system thus sold and to be sold and conveyed when completed as herein provided, hereby agrees to deliver to the Company in the manner hereinafter provided, the coupon bonds of the District, at their face value to the amount of Four Hundred and Fifteen Thousand Dollars (\$415,000.00).

IX.

In arriving at the amount of the consideration to be paid to the Company by the District, as hereinbefore set forth, the basis is that for each acre of land receiving a full water right, the bonds of the District, in the sum of Fifty Dollars, (\$50.00) shall be paid by the District to the Company; and for each acre of such lands receiving a fractional part of a full water right, the District shall pay the Company the bonds of the District in the same fractional part of Fifty Dollars (\$50.00); the sum in each instance to be determined by the assessment it benefits against said lands, in the manner provided by law. No bonds are to be delivered by the District to the Company

for those lands against which no benefits are assessed.

X.

The District is fully aware that the Company shall have the right to sell and transfer the bonds so delivered and to be delivered to the Company by the District hereunder, to divers persons, and by reason thereof any failure on the part of the Company to comply with the terms of this agreement, or any of them, shall in no wise affect the validity of such bonds or any of them as binding obligations of the District.

XI.

All conveyances provided for herein shall be by good and sufficient deed and in the usual form and shall be of such character as will meet the approval of counsel for the respective parties hereto, and all property conveyed shall be free and clear of all incumbrances.

XII.

It is understood and agreed that the acceptance by the District of the conveyance of the constructed portions of the work as completed by the Company, based on the monthly estimates, shall in no case be deemed a final acceptance of such property or any part thereof, or be deemed a waiver of any rights of the District to require a full conveyance of that portion of the entire system contemplated under this agreement, when the same shall be fully completed as herein provided, nor a waiver of any right to object to any imperfect work, or construction whether

as to workmanship or materials used relative to any conveyed or other portion of such work until finally accepted as herein provided, nor a waiver of the right of the District to require before acceptance, that all faulty or imperfect work, or materials, or construction, be torn out and rebuilt in accordance with the plans and specifications therefor before final acceptance of the same.

XIII.

The Company will furnish all material and build a suitable dam at the place designated in the plans, according to the plans and specifications therefor; together with all canals, main laterals and waste ways necessary to carry the water required for the lands situated in said irrigation district, and of sufficient capacity to, under normal conditions, and without endangering the strength of said canals and main laterals, carry the water contemplated to be stored for the District under this contract, all of the same to be built and constructed in the manner approved by the Engineer of the Company and according to the plans and specifications therefor.

XIV.

The Company will build and construct, at its own proper cost and expense, a telephone line along the right of way of said canal to the dam site, to be conveyed to the District, but reserving unto the Company the perpetual right to use and occupy said poles for the purpose of carrying its own telephone wires; the cost of maintaining and renewing said telephone line after the completion and acceptance by the Dis-

trict, to be shared by the parties thereto in proportion to their respective interests; and it is hereby stipulated that the interest of the District in the same is to be a thirty-five and twenty-six one hundredths per cent (35.26%) interest.

XV.

The Company will furnish said District 24,900 acre feet of water to be stored in each season in said reservoir, delivered in the reservoir, and to be used as desired by the District during the irrigation season in each year, as part of the consideration of this contract; provided, however, that in the event there shall be a shortage of water in any season, caused by no fault or neglect on the part of the Company, and the water stored in said reservoir shall not equal the maximum amount stored therein under ordinary conditions in ordinary years, then and in that event, the District shall pro rate with the other tenants in common of said reservoir, the actual amount of water stored therein for said season in proportion to the interest owned by the District in said reservoir, that is to say: thirty-five and twenty-six one hundredths per cent (35.26%) of the entire amount of water stored for said season, and it is expressly contracted that the Company shall not sell a greater amount of water, or interest in said system representing a greater amount of water in the aggregate, including the water and interest it has hereinbefore contracted to sell to the District, then the total amount of water, which, in ordinary years, under ordinary conditions, shall be stored in said reservoir.

If for any reason any portion of the acreage included within said District, and for which is included in this contract a water supply, should lie above the main canal as finally determined and constructed, or against which no benefits shall be assessed, a deduction shall be allowed in the above amount at the rate of fifty dollars (\$50.00) per acre for all acreage excluded, and the quantity of water to be furnished shall also be reduced at the rate of three (3) acre feet of water for each acre so excluded, and the interest in the reservoirs, rights of way and main canals situate outside of said irrigation district, shall also be reduced proportionately.

XVI.

It is covenanted and agreed that no bonds shall be issued, or water rights or maintenance charges taxed against any lands within said district which receive no benefits from the irrigation works and against which no benefits shall be assessed by the District.

XVII.

On all bonds delivered by the District to the Company, the Company agrees to reimburse the District for the interest paid thereon for the time from the date of the issuance of the bonds until the completion of said system by the Company, and the acceptance of the same by the District. The Company agrees to advance and pay for the District, the interest due on July 1st on said bonds, of the first irrigation season after the completion of said system. The District to repay said advancements to the Com-

pany on the first day of January, following the first irrigation season said water is used by the District.

XVIII.

It is further understood and agreed, as part of the consideration and purchase price of said irrigation works, that the exclusive right to the perpetual use of all water stored in said reservoir site by means of said proposed dam, or any dam, or otherwise, for power and other purposes at any point or points between the dam and the head-gate of the main canal, is hereby reserved to the Company, its successors and assigns forever, provided, however, that such use for power and other purposes shall not in any way interfere with the use of said water by the District whenever needed for irrigation purposes; and provided, further, that whenever the water is so used for such power or other purposes, the duty and cost of patrolling the dam shall be borne entirely by the Company.

XIX.

It is further covenanted and agreed that the use of water furnished to said District under this contract is to be, and the same is hereby limited to those certain specified tracts which are included within the boundaries of said District, as the same existed at the time of the bond issue and against which are assessed the benefits of said irrigation system.

XX.

It is understood and agreed that the Company reserves and shall have the sole right to contract for and sell in the future any and all water which may

be needed by any lands within (or without) said irrigation district, as the boundaries thereof now exist or as they may be hereafter extended, against which no benefits, or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water; provided, it builds such canals of sufficient size to provide for future requirements in the first instance or that it enlarge said canals at its own proper cost and expense when needed, and pay the same rate or proportion of the maintenance charges as is paid by the other land owners, and provided, further, that in the event the Company shall desire to enlarge said canals as hereinbefore set forth, it shall do so at such times and in such manner as not to interfere with the use and enjoyment of the District of its water and vested rights; and the Company further reserves to itself the sole and exclusive right to enlarge the storage capacity of said reservoir, but only in accordance with the plans and specifications to be approved by the State Engineer of the State of Idaho, before such enlargement; and provided, further, that such enlargement shall be made in such manner as not to endanger the property and rights of the District; and provided, further, that in the event the Company shall enlarge said reservoir to a capacity in excess of 70,617 acre feet, then and in such event in case of shortage of water or in extraordinary or dry seasons, the District will not be required to prorate the water to be stored in said res-

ervoir, as provided in Section XV of this contract, with the other tenants in common to the extent of more than 70,617 acre feet, that is to say that when any season shall be less than 70,617 acre feet, the District shall prorate only with the other tenants in common owning the first 70,617 acre feet, including the District, but when the amount of water stored equals 70,617 acre feet or more the District shall be entitled to its full quota of water provided for under this contract.

XXI.

It is further agreed that before any petition for the annexation to said District of adjacent lands, shall be granted, the directors of the District shall cause petitioners named in said petition to pay or provide satisfactory security for the payment, in addition to any other amount which is provided for, the sum of Fifty Dollars (\$50.00) per acre, with interest, as a maximum, which shall be paid to the Company upon its furnishing the additional amount of water required to irrigate said land, at the rate of three (3) acre feet of water per acre, and in case said land already has a partial water right the Company may, at its option, accept such reduction from the above maximum as may in its judgment be just and proper, and only such reduction as may be satisfactory to the Company will be accepted by the Directors of said District, provided, that in the event of the taking in of lands under such conditions, the Company shall at its own proper cost and expense, en-

large the canals and laterals to a sufficient capacity to carry said water for said additional lands.

XXII.

As certain lands included in the District are embraced in desert and homestead land entries, title to which is in the United States, and by reason whereof annual assessments for the payment of principal and interest on the bonds of such District cannot be enforced against such lands until title thereto passes to the entryman, the Company hereby agrees to advance and pay to the District, any and all delinquent payments of the holders of such desert or homestead lands, that would be applicable to the payment of the principal or the interest of the bonds of the District, or any of them, until the title to such land passes from the United States to those entitled to receive the same, and in consideration of which the District agrees to adopt and enforce such by-law or by-laws as may be necessary to require the claimants to such lands to pay any and all of the said assessments against such lands annually in advance of the right to use or apply any water from such irrigation system to the irrigation of such lands, or any portion thereof, pending the passing of title thereto from the United States.

And the District hereby agrees to use its utmost endeavors by providing stringent by-laws, and otherwise, to collect all taxes assessed against said unpatented lands on account of the payment of the principal or interest of the bonds of the District,

that may become delinquent, or be not paid by the entryman, and which shall under the provisions of this agreement be advanced by the Company, and when so collected the District will reimburse the Company for any sums advanced by it to the amount collected by the District.

XXIII.

It is further agreed, that upon the completion of the irrigation system and before the final conveyance thereof as herein provided, to the District, the same shall be accepted by a resolution of the Board of Directors of the District, within thirty (30) days after written notice of such completion, showing that the same has been constructed in accordance with the plans and specifications herein referred to, and in the event of a disagreement in relation thereto, the engineer of the District and an engineer to be designated by the Company, shall select an engineer wholly disconnected in every way with the Company or the District, or any contractor on said construction, and a decision of a majority of such three engineers as to whether or not such work has been constructed in accordance with the plans and specifications will, in the absence of fraud, be final, and in the event such works have not been so constructed as determined by such engineers, the Company shall proceed at once to complete the works in conformity with such plans and specifications.

XXIV.

It is contracted that there shall be no charges against the District by the Company, for extra cost

of construction necessitated by any change of plans or any fault or omission contained in the plans and specifications for such system. All such extra expense, if any, to be borne by the Company.

XXV.

The Company shall remove and replace at its own expense, any work that shall have been improperly executed. All work contemplated in this agreement must be done subject to the approval of the engineer of the District, but should there be a disagreement between the engineer of the District and the engineer of the Company over any such work, the same shall be decided by an engineer to be by them jointly selected but which third engineer shall be in no wise connected with the Company, the District, or any contractor on the work, and his decision shall be final in the premises.

XXVI.

It is contracted that the Company shall be responsible for all damages arising from accidents or neglect of the contractors or their workmen in the construction of said system and to hold the District harmless by reason of any such damages arising from the execution of this agreement.

XXVII.

Upon the execution of this agreement the Company agrees to give the District good and substantial bonds in the sum of One Hundred Thousand Dollars (\$100,000.00), Fifty Thousand Dollars (\$50,000.00) of which bonds may be given by a Surety Company and Fifty Thousand Dollars (\$50,000.00) by individ-

uals, and all to be approved by the District, conditioned for the faithful performance of the terms of the agreement by the Company to be kept and performed, and for the construction of the irrigation works covered by this agreement, in accordance with the plans and specifications herein mentioned, and their completion and conveyance within the time herein stated, and for the maintenance of said system for a period of five (5) years, pursuant to the conditions of this contract.

XXVIII.

It is mutually covenanted and agreed by and between the parties hereto that in case the Company shall not increase the storage capacity of its dam and reservoir site to 70,617 acre feet of water, within five (5) years from the delivery and acceptance of the proportion of said irrigation system, etc., contemplated by this contract, then and in that event the Company, by good and proper conveyance will convey unto the District, an additional percentage of interest in and to the reservoir, reservoir site, water permit, flowage rights, canals, flumes, laterals, etc., mentioned and described in Paragraphs a, b and c of the section numbered II of this contract, equal to fourteen and forty-five one-hundredths per cent. (14.45%) thereof, so that the District will own and have a forty-nine and seventy-one one-hundredths per cent (49.71%) interest of, in and to the said described works.

It being understood and agreed that the basis by which the percentage mentioned in this contract are

obtained, is the maximum capacity of the reservoir in acre feet as compared with the amount of water hereby sold in acre feet, so that if the reservoir is increased to 70,617 acre feet capacity the percentage set forth in Paragraph II is correct and shall stand but shall be increased as herein provided in the event the capacity of the reservoir shall not be increased from 50,000 to 70,617 acre feet of water.

XXIX.

It is mutually agreed that the following maps, blue prints, plans and specifications hereinbefore referred to as "the plans and specifications" and endorsed on the face and margin thereof, "E. D. Ford, President, Crane Creek Irrigation Land and Power Company, and O. M. Harvey, President, and A. D. Redford, Secretary, Sunnyside Irrigation District, and C. C. Cleary, President, and Maude Kiser, Secretary, Crane Creek Irrigation District," are hereby referred to and made a part of this contract, to-wit: The attached sheets and writings numbered 1 to 10, both inclusive.

XXX.

It is mutually understood and agreed that the provisions of this agreement shall be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the respective parties hereto have caused their corporate names to be hereunto subscribed by their respective presidents, sealed with their corporate seals and duly attested by their respective secretaries, the day and year first above

written, pursuant to the authority of a resolution of their respective Boards of Directors.

CRANE CREEK IRRIGATION LAND
AND POWER COMPANY,

By E. D. Ford, Its President.

Attest: E. P. Hall, Secretary.

Crane Creek Irrigation Land
and Power Company,
Idaho, incorporated 1909.

SEAL.

Witnessed by Ed. R. Coulter,

SUNNYSIDE IRRIGATION DISTRICT,

By O. M. Harvey, Its President.

Attest: A. D. Redford, Secretary.

Sunnyside Irrigation District, Corporate

SEAL.

I, A. L. Richardson, Clerk of the U. S. District Court for the District of Idaho, Southern Division, do hereby certify that the foregoing printed transcript is a full, true and correct copy of a certain contract in writing of date Aug. 22nd, A. D. 1910, between the Crane Creek Irrigation Land & Power Co. and Sunnyside Irrigation District, filed and received in evidence upon the hearing of this cause as Sunnyside Irrigation District, Exhibit "B," and that the same was and is a part of the original record on appeal by the said Sunnyside Irrigation District herein.

Witness my hand and the seal of said court this 22nd day of September, A. D. 1915.

A. L. RICHARDSON.

By Pearl E. Zanger, Deputy Clerk.

Deputy Clerk.

2645

No. _____

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

PORTLAND WOOD PIPE COMPANY,
A CORPORATION,
Appellee,
VS.
CRANE CREEK IRRIGATION DISTRICT,
A CORPORATION,
AND
SUNNYSIDE IRRIGATION DISTRICT,
A CORPORATION,
Appellants.

Brief for Appellants.

C. S. VARIAN,
E. R. COULTER,
Solicitors for Crane Creek Irrigation District and Sunny-
side Irrigation District, Appellants.

Filed

OCT 4 - 1915

T. D. Monckton.

No. _____

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.**

PORTLAND WOOD PIPE COMPANY,
A CORPORATION,

Appellee,

VS.

CRANE CREEK IRRIGATION DISTRICT,
A CORPORATION,

AND

SUNNYSIDE IRRIGATION DISTRICT,
A CORPORATION,

Appellants.

Brief for Appellants.

This is an appeal from a decree from the District Court of the United States for the Southern District of Idaho, Southern Division, charging a mechanic's lien against the irrigation system of appellants, and directing a foreclosure and sale thereof in default of a satisfaction of the amount found to be due the appellee for materials furnished a sub-contractor upon the construction of a certain portion of the system.

On November 7th, 1914, the appellee, Portland Wood Pipe Company, exhibited its Bill of Complaint in the said District Court to foreclose an alleged mechanic's lien against the interest of appellants in a certain irrigation

system common to both districts. It impleaded as defendants, these appellants, Slick Brothers Construction Company (hereinafter called "Construction Company"), Crane Creek Land & Power Company (hereinafter called "Company"), Maney Brothers & Company, a co-partnership, and others. The Construction Company answered the bill and filed a cross bill which, upon the hearing, was finally dismissed. The several cross bills of the other defendants, with the exception of that of Maney Brothers & Company were also dismissed, and the only defendants interested in this appeal are appellants.

The bill of appellee alleged that the Construction Company on or about April 2nd, 1913, entered into a contract in writing with the defendant Company for the construction of the irrigation system, etc., alleged in the bill to be owned by the Company, but that the Districts owned or claimed to own some interest therein, and that the same was on November 8th, 1913, supplemented and modified by another agreement between the parties; that the Construction Company entered upon the construction of the work and while so engaged on or about February 9th, 1914, purchased from the appellee, Portland Wood Pipe Company, for use in the construction of the said irrigation system, works and structures, certain material to be used in the erection thereof, particularly describing the same with accompanying prices; that deliveries of said material were made in accordance with said contract; that the last material was shipped on March 18th, 1914, and delivered a few days thereafter to the Company and was actually used by the Company in the construction of the said system; that certain extra materials and supplies were also on or before March 17th, 1914, delivered to the Construction Company, and also used in

the construction of the said system. (Transcript, 2, 14, 15, 20.)

The bill prayed that a mechanic's lien be charged against the system, and that a decree be passed foreclosing the lien and for sale of the premises. (Transcript, 24.)

The answers of appellants denied the ownership by the Company of the irrigation system, etc., admitting, however, that it owned 30.4 per centum of the said system lying outside the boundaries of the two irrigation districts. (Transcript, 48-63.)

The answers further alleged that each of the appellants was a public corporation and organized as an Irrigation District, and that under the laws of the State, no lien attached or could be charged against the irrigation system, the property of appellants. (Transcript, 53-68.)

A decree was given for the amount claimed, with attorney's fees and costs, and for the satisfaction thereof, charging "All the right, title and interest of Appellants in and to the irrigation system, including a reservoir and site, and all canals, ditches, head gates, flumes, pipe lines, laterals, and other structures, dams and works used, or intended to be used or required in connection with the distribution of the water from said reservoir and carrying and distributing water to the place or places of intended use; and all rights of way therefor, and particularly that certain canal on the southerly side of Crane Creek," (here follows a particular description of the canal and description of the lands which it crosses); "also all water rights and rights to the use of the water in connection with the reservoir and irrigation system, works and structures, hereinbefore described, acquired by said defendants, Sunnyside Irrigation District and

said Crane Creek Irrigation District, under their several contracts with the defendant, Crane Creek Irrigation Land & Power Company, and particularly the interest of the said Districts in the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company"; (describing six permits by number, record, and date). (Transcript, 198, 200, 201, 202.)

The decree also charged the lien upon all the interest of the Company in the irrigation system, declared to be 30.4 per cent, subject to the prior mortgage lien of Maney Brothers & Company.

It was further decreed that unless payment of the sums of money found to be due to Portland Wood Pipe Company were paid within thirty days, all of the property hereinbefore described be sold as an *entirety* and in one *parcel*, without value or appraisement, subject to the prior lien of a certain mortgage of Maney Brothers & Company upon the interest of the Company in the property, at public vendue, with right of redemption within three months after sale. (Transcript, 203, 204, 216.)

The questions made upon this appeal are whether a material man's lien under the laws of Idaho may be charged against the irrigation system of these appellants or any part thereof, and whether under said laws, any part of the said property may be sold at public sale for the satisfaction of any such alleged lien.

STATEMENT OF THE CASE.

On August 22nd, A. D. 1910, each of the appellants, Sunnyside Irrigation District and Crane Creek Irrigation District, entered into a contract in writing with the Company, and the Sunnyside District contract was re-

ceived in evidence as District's Exhibit "B," but through an oversight of the clerk or the printer, was not embraced in the printed transcript of the record herein, although the precipe called for its insertion. (Transcript, 238.) It is, however, set out at large in the transcript of record upon the appeal of Maney Brothers & Company in this case on pages 101 to 121, both inclusive. There is also a stipulation between the solicitors for the respective parties to this appeal, that all original exhibits introduced in the cause may, with the consent of the court, be transmitted to the clerk of this court before the hearing of the cause here, and may be used upon the argument or the hearing, and shall be considered as part of the record as fully and to the same extent as if transcribed and printed in the record; and that appellants may, if it be deemed necessary by this court, print such exhibits as part of the record not included in the statement of the evidence as settled and allowed. (Transcript, 82.) The said contract is referred to in the testimony of witnesses Coulter and Ford. (Transcript, 75-80.) Exhibit "B" will be printed and certified to this court. It was stipulated that the contracts made between the Districts and the Company were identical, save as to the respective interests of the Districts. (Transcript, 73, 74.) Since, however, this contract is the original contract of construction through which the appellee, as a sub-contractor, derived the right to charge its lien against the Districts' property, and is before this court upon another appeal in this case in which the question of the right to charge the property with a mortgage lien is presented, we therefore assume there will be no objection to referring in this brief to the record on the appeal by Maney Brothers & Company

for knowledge of its contents. This contract recited that the Company was the owner of a partially constructed irrigation system consisting of a dam site, reservoir, dams, canals, and other structures being constructed for the purposes of storing, impounding, diverting and distributing certain waters, and was also the owner of certain water rights, etc. (Transcript, Maney Brothers & Company, 102.) Upon the hearing in relation to this contract, Edwin D. Ford, President of the Company, testified that at the time of its execution, to-wit, August 22nd, 1910, the "said Company had actually completed nothing, but had acquired a right of way and reservoir site; that it owned the reservoir site and certain rights to waters and water appropriations; that part of Sunnyside canal or ditch belonged to that Company, but nothing had been done on their reservoir." (Transcript, 80.) This evidence is not controverted. By this contract, the Company agreed to sell and convey, and each District agreed to purchase certain percentages of interest in and to certain permits, water rights, rights of way, canals, flumes and laterals, and in all canals, pipe lines, flumes and aqueducts situate wholly without the boundaries of the District; and also the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of the District. (Transcript, Maney Brothers Co., 104, paragraph 2.) The Company also agreed to convey to the Districts certain percentages of interest in and to the water rights and reservoir site, excepting right of possession thereof, which was to be held until final conveyance; "and upon the completion of any portion of the said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the Districts such com-

pleted portion with the same proportions of the rights of way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest in and to said water rights, appropriations, reservoir sites, rights of way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances contemplated in this agreement, and agreed to be sold and conveyed hereunder, together with the possession thereof to the District."

In consideration of the delivery by the District to the Company, coupon bonds of the face value of \$100,000 and of deliveries by the District to the Company upon receipt of the conveyance above referred to, coupon bonds at face value to an amount equal to such part of the entire bond issue of the District to be sold and delivered under the contract as the constructed portion of the works of the Company bore to the entire work to be constructed for the use and benefit of the District, the Company agrees to make the aforesaid conveyances. (Paragraph 7.)

In consideration of the agreements by the Company, and in full payment of the said system to be sold and conveyed when completed as in the contract provided, the District agreed to deliver to the Company its coupon bonds at their face value to the amount of \$415,000. (Paragraph 8.) It was further provided that all conveyances should be by sufficient deed, and that all properties conveyed should be free and clear of all incumbrances. (Paragraph 11, Transcript, Maney Bros. Co., 107-108-110.)

The Company agreed to furnish the District 24,900 acre feet of water each season, to be stored in the reser-

voir and to be used as desired by the District during the irrigation season as part of the consideration of the contract, with the proviso, however, that in the event of a shortage of water and the water stored should not equal the maximum amount therein under ordinary conditions in ordinary years, that the Districts should pro rate with the other tenants in common of the reservoir. (Paragraph 15.)

It was further agreed that the exclusive right to the perpetual use of all water stored in the said reservoir site at any point or points between the dam and the head gate of the main canal, was reserved to the Company, its successors and assigns forever, provided, however, that such use should not in any way interfere with the use of the said water by the District when needed for irrigation purposes (paragraph 18); and that the use of the water furnished to the Districts under the contract should be limited to the certain specified tracts included within the boundaries of the Districts as the same existed at the time of the bond issue, and against which are assessed the benefits of the system. (Paragraph 19. Transcript, Maney Bros. Co., 113-114.)

It was also agreed that the Company reserved, and should have the sole right to contract for and sell in the future, any and all water which may be needed by any lands within or without said Irrigation District as the boundaries thereof now exist, or as they may be hereafter extended, against which no benefits or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water (paragraph 20); provision was made for the giving of bonds to each District in the

sum of \$100,000 by the Company, conditioned for the faithful performance of the contract and the construction of the work. (Paragraph 27, Transcript, Maney Brothers & Co., 114-119.) A similar contract was made between the appellee, Crane Creek District, and the Company on the same date, being Exhibit "N." (See stipulation, Transcript, 73.)

By another and supplemental contract of date August 22nd, 1910, between the same parties, the Company agreed to maintain and operate an irrigation system for the period of five years from and after its completion, acceptance and conveyance to the District, and to deliver over the system at the end of the said five-year period in the condition which the plans and specifications required it to be in at the time of its completion and acceptance by the District, except ordinary use and wear thereof. (Transcript, 135.) April 2nd, 1913, the Company contracted with the Construction Company for the construction of the uncompleted portion of the system. (Bill and Answer, Transcript, 14-48.)

ASSIGNMENT OF ERRORS.

By Appellant Crane Creek Irrigation District.

I.

The United States District Court for the District of Idaho, Southern Division, erred in ordering, adjudging and decreeing that the plaintiff, Portland Wood Pipe Company, is entitled to and has a first charge and lien for the security and payment of the sums of money adjudged to be due plaintiff from the defendant, Slick Brothers Construction Company, to-wit, \$9733.94, with interest thereon at 8 per cent per annum from June 24, A. D. 1914, recording and attorney's fees, aggregating in the

sum of \$11,244.30, with costs, upon all the right, title and interest of this defendant, Crane Creek Irrigation District, in and to the property in said decree particularly described as constituting the irrigation system constructed by the defendant Crane Creek Irrigation Land & Power Company for this defendant, and the defendant, Sunnyside Irrigation District, and all the water rights, permits, rights-of-way, and appropriations connected with and necessary to the use of said system. For a particular description of said system and property, reference is hereby made to said decree.

II.

The said Court erred in ordering, adjudging and decreeing that the said plaintiff, the Portland Wood Pipe Company, was entitled to and had a mechanic's lien under the laws of the State of Idaho, which was a charge and lien upon the interest of this defendant in the irrigation system constructed by the Crane Creek Irrigation Land & Power Company for this defendant, and the defendant Sunnyside Irrigation District, and all the water rights, permits, rights-of-way and appropriations connected with and necessary to the use of said system. For a particular description of said system and property reference is hereby made to said decree.

III.

The said Court erred in deciding and adjudging as matter of law that material-men furnishing supplies and material for the construction of an irrigation system for the use and benefit of irrigation districts, such as this defendant, were entitled to liens as security for the value of such material, against the irrigation system, and it

erred in deciding and adjudging that the laws of the State of Idaho granted or permitted the charging of such property with mechanics' or material-men's liens.

IV.

The said Court erred in ordering, adjudging and decreeing that the said irrigation system and property be sold as an entirety and in one parcel; and in ordering, adjudging and decreeing that the said property was subject to execution or foreclosure sale.

V.

The said Court erred in adjudging and decreeing that the entire system, including its water rights, permits, rights-of-way and appropriations connected with and necessary to its use should be sold in one parcel, without valuation, or appraisement, and without provision for the application of the proceeds of the sale of the interest of the Crane Creek Irrigation, Land & Power Company in the system and property, if any there should be after satisfaction of the Maney Brothers' mortgage lien, being first applied in satisfaction of plaintiff's claim, before resort should be had to the interests of this defendant.

VI.

The Court erred in not dismissing plaintiff's bill of complaint as against this defendant, and its interest and property right in the irrigation system hereinbefore in the pleadings and decree mentioned.

Wherefore, this defendant, Crane Creek Irrigation District, prays that the said judgment and decree of the District Court of the United States for the District of

Idaho, Southern Division, be reversed, with directions to dismiss the bill of complaint of the Portland Wood Pipe Company as against this defendant, and for costs.

(Assignments of error are the same on each appeal. Transcript, 219, 224.)

ARGUMENT.

Irrigation Districts are quasi municipal corporations, organized solely for public purposes, and their property is dedicated to public uses in aid of the declared public policy of the State. The use of all waters appropriated for sale, rental or distribution, is declared to be for public use and subject to the regulation and control of the State in the manner prescribed by law.

(“The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use and subject to the regulation and control of the State in the manner prescribed by law.”)

Idaho Constitution, Article 15, Section 1, Rev. Codes, Vol. 1, p. 127.

(“The use of all water required for the irrigation of lands of any District formed under the provisions of this Title, together with the rights-of-way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this Title, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law.” (Rev. Codes, Sec. 2386, as amended Session Laws 1911, p. 195.)

The Districts are organized under the provisions of Title 14, Revised Codes, as amended from time to time, and their business is administered by a Board of Directors.

The directors are elected by the electors of the district, and are required to give bonds to the state.

(“Sec. 2378. On the second Tuesday of December following the organization of any district an election shall be held at which shall be elected three directors by the electors of the district at large. The terms of the office of directors shall be three years. The directors shall, immediately after the first regular election following such organization, be selected by lot so that one shall hold his office for the term of one year, one for the term of two years, and one for the term of three years, and an election shall be held in each district on the second Tuesday in December of each year thereafter, at which one director shall be elected for a term of three years, or until his successor is elected and qualified. Such director must be a qualified elector and a resident of the division of the district whom he is to succeed in office. Within ten days after receiving the certificates of election hereinafter provided for, said officer shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the probate court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof and filed with the secretary of said board. All official bonds provided for in this title shall be in the form prescribed by law for the official bond of county officers.” Rev. Code. p. 199.)

(“Said Board shall have the power to manage and conduct the business and affairs of the district; make and execute all necessary contracts; em-

ploy and appoint such agents, officers and employees as may be required, and prescribe their duties; and to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land as may be necessary and just to secure the just and proper distribution of the same. * * * Said Board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment.

Said Board may also construct the necessary dams, reservoirs and works for the collection of water for said districts; and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes." Rev. Codes, Sec. 2386; amended Session Laws 1911, 194; 1915, 308.)

Originally, the Board was forbidden to let a contract of any kind unless there should be sufficient money in the Treasury at the time of letting, available for such payment, to fully pay for the work or material so contracted for, and was restricted in the use of the District bonds to cases of purchase of its water system.

("Provided, That no contract of any kind shall be let by said Board of Directors unless there is sufficient money in the District Treasury at the time such contract is let, available for such payment, to fully pay for the work or material so contracted for." Rev. Codes, Sec. 2416, Vol. 1, p. 1019; re-enacted in amendment Session Laws 1915, 315.

“In case of purchase, the bonds of the district hereinafter provided for may be used to the par value for payment.” Rev. Codes, Sec. 2386.

“The Board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this Title.” Rev. Codes, Sec. 2404.)

Before the contract with the Construction Company, hereinbefore mentioned, was made, it was enacted that bonds might be used in payment for construction and delivered directly to the contractor.

(Sec. 2404A. “In lieu of sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this Title, bonds authorized by the vote of the district for the purpose of acquiring or constructing irrigation works may be issued and delivered by the board of directors directly to the contractor in payment for such construction work.”) Act of March 12, Session Laws 1913, 542; new section.

The bonds issued by the Districts pursuant to the statute, and the interest thereon are paid by annual assessments upon the land in the Districts.

(Sec. 2405. “Said bonds and the interest thereon shall be paid by revenue derived from the annual assessment upon the land in the District; and all the land in the District shall be and remain liable to be assessed for such payment.” Rev. Codes, Vol. 1, p. 1014.)

The Board is empowered to make assessments upon the lands within the Districts according to benefits, upon public hearing had. No State lands may be assessed, but the State Land Commissioners may contract with the Board to provide for payments out of the general fund

of the State to be applied on the cost of construction, etc.

(Sec. 2400. "After the Board shall have examined the lands in said district, and before proceeding to make the assessment of benefits * * * they shall give notice to the owners of said lands that they will meet at their office on a day to be stated in said notice for the purpose of making such assessment. * * * At such meeting the Board shall proceed to hear all parties interested who may appear, and they shall continue in session from day to day until the assessment is completed." Rev. Codes, Vol. 1.)

(Sec. 2439. "No State lands included within any legally organized irrigation district shall ever be assessed. * * * The State Board of Land Commissioners is hereby empowered to enter into a contract with the board of directors of such irrigation district * * * and such contracts shall provide that an annual payment shall be made each year out of the general fund to said board of directors to be applied on the cost of constructing such irrigation works within said district, until the full amount of such benefit is paid." Rev. Codes, Vol. 1.)

MECHANICS' LIEN LAWS DO NOT APPLY TO PUBLIC CORPORATIONS OR PROPERTY DEDICATED TO PUBLIC USES, UNLESS THE LEGISLATURE BY STATUTE SHALL EXPRESSLY PROVIDE FOR SUCH LIENS, SINCE PUBLIC PROPERTY OR PROPERTY DEDICATED TO PUBLIC USES IS NOT INCLUDED WITHIN THE PURVIEW OF SUCH STATUTES BY IMPLICATION.

There is no such statute in Idaho.

The following is the text of the Sections of Idaho Codes applicable here:

(Sec. 5110. "Every person performing labor upon, or furnishing materials to be used in the con-

struction, alteration, or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent." Rev. Codes, Vol. 2, p. 306.

Sec. 5111. "Every sub-contractor and laborer or other person, who performs labor, or furnishes material for any original contractor or sub-contractor, to be used in the construction, alteration or repair of any building, machinery or other structure, for any county, city, town or school district, has a lien upon such building, machinery or structure, and all the provisions of this chapter respecting the securing and enforcing of mechanics' liens shall apply thereto so far as applicable." Rev. Codes, Vol. 2.)

The Legislature has here expressly designated the particular public corporations which shall be subject to the mechanics' lien laws. Irrigation districts are not included, and in accordance with the elementary rule of construction, must be held not to be within the statute.

Boisot Mech. Liens, Sec. 208, Sec. 188;

Dillon Municipal Corporations, 4th Ed., Vol. 2, Sec. 572;

Dillon Municipal Corporations, 4th Ed., Vol. 3, Sec. 993;

Phillips Mech. Liens, 3rd Ed., Sees. 179-180;

Cyc., Vol. 27, p. 125;

Buncombe Co. Commrs. v. Tommey, 115 U. S. 122;

McNeal Pipe & Foundry Co. v. Bullock, 38 Fed. 565;

Guest v. Merion Water Co., 142 Pa. St. 610, 21 Atl. 1001;

Foster v. Fowler, 60 Pa. St. 27;

First Nat. Bk. of Idaho v. Malheur Co.
(Or.), 35 L. R. A., and note;

Hutchison v. Krueger, et al., 34 Okla. 23,
124th Pacific 591.

In the case of Hutchison v. Krueger, *supra*, there is an exhaustive review of the authorities upon this question. The Court said:

“The general rule that a lien will not lie against public property devoted exclusively to public use, has been almost universally adopted in the various states of the union, and has been announced by all of the American text-writers discussing mechanics’ liens whose work we have been able to examine. Boisot on Mechanics’ Liens at Sec. 208: ‘There can be no mechanics’ lien on public property unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and also would be incapable of enforcement; public property not being subject to forced sale. For this reason there can be no mechanics’ lien on a county court house nor on county buildings.’ ”

The Court reviews the cases and quotes therefrom to a like effect.

So far as we know, the Supreme Court of Idaho has not passed upon the question here involved. It has held that in cases arising under the Carey Land Act, the State under the statutes was authorized to contract with individuals and private corporations for doing construction work, and that both an Act of Congress and an Act of the State Legislature authorized the charging of interests of contractors in the property with liens, etc., saying:

“It should be borne in mind, however, that under the act of Congress and the state statute above cited, both the general government and the state legislature have granted the right of lien upon

lands to be irrigated to any person, association or corporation taking a contract from the State to the extent of 'the actual cost and necessary expenses of reclamation.' The act of the Legislature, in conformity with the act of Congress, has granted a lien to 'any person, company, or association, furnishing water for any tract of land,' for the expense of the construction of the works, or rather to the extent of the price allowed to be charged for the water right for each acre of land. Under this enactment of the state Legislature, it is clear to us that the contractors and sub-contractors, under a construction company like the appellant, would be entitled to avail themselves of the benefit of the lien laws of the state; and that in case of foreclosure and sale under the lien they would be entitled to sell all the right, interest, and claim of the construction company; and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests and privileges of the construction company therein. If it be conceded by appellant that it has no interest in or title to any of this property, and no right of possession thereto, then we grant that the respondent can sell nothing at a foreclosure sale. * * * The appellant is not the representative of either the state of Idaho or the general government, and is in no position to present the interests of either here, and cannot complain for or on account of any pretended claim that may be preferred against either."

Nelson Benett Co. v. Twin Falls Land & Water Co., 14 Ida., p. 5, 93 Pac. 789, 792;

Hill v. Twin Falls L. & W. Co., 22 Ida. 274, 125 Pac. 204.

The State statute referred to in the opinion is as follows:

("The water rights to all lands acquired under the provisions of this Act shall attach to and become appurtenant to the land as soon as title passes

from the United States to the state. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right.”)

Section 20, Act March 3rd, 1899, Session Laws 1899, p. 456.

The Court in adjudging a lien in favor of a contractor in the case last above cited placed its decision upon statutes of the state and the United States *expressly* creating the lien. The lien there enforced was only upon the land and water right of the individual owner, and restricted to the “person, company or association furnishing water for any tract of land.”

This court followed these decisions in *Continental etc. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976.

The irrigation districts, appellants in the instant case, were created for the express purposes of administering a great public trust. In aid of this purpose, the law contemplates the construction and maintenance of a *system* comprising reservoirs, dams, canals, pipe lines, flumes, ditches, etc., and as necessary incidents, the ownership of rights to water. This system may not be segregated into its component parts—its ownership or control can not be separated nor sold, and the administration of the trust be thus committed to others than the trustees appointed by law.

A clear and comprehensive statement of the legal *status* of irrigation districts is found in the opinion of the Supreme Court of California, *In re Bonds of Madera Irrigation District*, 92nd California 296-322, 28th Pacific 272, wherein, in construing similar statutes, *inter alia*, it is said:

“When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized upon the vote of a majority of its electors, to issue its bonds, and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is *in trust for the public, and subject to control of the state*. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public.” (Italics ours.)

The foregoing is quoted at length with approval by the Supreme Court of Idaho in *Pioneer Ir. Dist. v. Walker*, — Idaho —, 119 Pacific 307.

In recognition of the justice of claims of contractors who should furnish materials and perform work upon irrigation systems to be acquired by irrigation districts, the legislature, in the year A. D. 1909, enacted a statute,

entitled, "An Act for the protection of persons furnishing materials and labor for the construction, alteration or repair of public buildings and works," as follows, to-wit:

"Section 1. That hereafter any person or persons entering into a formal contract with the state, any county, city, town, school or irrigation district, or any quasi public corporation of the state, for the construction, alteration, or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of \$200.00, shall be required before commencing such work, to execute the usual penal bond, in a sum equaling sixty per cent at least, of the contract price, to be approved by the officer, board or body authorized to make such contract, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or material used in the construction, alteration or repair of any public building, public work or quasi public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, the remainder shall be distributed pro rata among said interveners.

If no suit should be brought by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit that labor or materials for the prosecution of such work has been supplied by him or them, and payment for it has not been made, be furnished, without cost to him or them, with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, for his or their use and benefit, against said contractor and his surety, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided, further*, That where a suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amount found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court for distribution among said claimants and creditors, the full amount of the surety's liability, to-wit: the penalty named in the bond, less any amount which said surety may have had to pay to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, by reason of

the execution of said bond, and upon so doing, the surety will be relieved from further liability: *Provided, further*, That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice by publication in some newspaper of general circulation, published in the county where the contract is being performed, for at least three successive weeks, the last publication to be at least one month before the time limited therefor.

Section 2. "Except when the contract price is \$200.00 or less, it shall be unlawful for any officer of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, to allow any claim for money, or to pay out and disburse any money to any person on account of any contract for the construction, alteration or repair of any public building, public work, or quasi public work, until a good and sufficient bond, as provided in section one of this act, is furnished and provided." Session Laws, 1909, 165.

By this law, the Legislature has expressly provided for the security of persons furnishing material and labor for the construction of public works, including "irrigation district," thereby clearly indicating an intention to continue its existing policy of excluding the property of such public corporation from the operation of the lien laws of this state. It provided a bond for the protection and payment of material men and labor who should furnish materials and perform labor on public works of this character, and since mechanic's liens only exist in this country by force of the statutes creating them (Boisot, *Mechanic's Liens*, pp. 4, 5), payment of such claimants can only be enforced in the way and by the means provided by the statute. The learned judge of the

court below found a difficulty in believing that there was an intention of the Legislature to withhold the right of lien in the case of an irrigation district, but concluded that question was not involved in this case. He was of the opinion that the material furnished by the appellant was for the construction of the works belonging to the Company and not to the irrigation districts, and while admitting that the system was to be conveyed to the districts, assumed that the law was so understood by the districts that they could not contract to pay bonds for construction of irrigation works, and therefore intended the construction should be for the Power Company and that they would buy the completed structures. His conclusion was, that being the case, the districts took the title subject to such liens as incumbered the property when it came into ownership and possession of the Company, which must have acquired title subject to the liens of the workmen and material men. He thought the districts should not be permitted to take an inconsistent position, and that the nature of the contract aforesaid advised appellant that districts did not claim to own the property and that the Power Company was merely a construction company, and applying the doctrine of equitable estoppel, reasoned that the districts having held out to the world that they were merely the purchasers of the property and were not engaged in construction, could not change their position "to the hurt of persons who in good faith dealt with the Power Company as the owner of the property." (Transcript, 188-9.)

As we have heretofore shown in this brief, the districts did require surety bonds pursuant to the statute, and such bonds were given. The contract with the Company was a contract for construction and conveyance, and

contemplated finally taking over the entire property by the district. These districts being public corporations, their officers are public officers.

In re Madera Irrg. Dist., 92 Cal. 296;

Peoo v. Semple Dis., 98 Cal. 206;

Fairbrooke Irrg. Dist. v. Bradley, 164 U. S. 174.

The California Court, in another case, held that the name of the district, it having by that name a prima facie legal existence by the official record of its organization, is a sufficient identification of its boundaries, and that "all persons were required to take notice of the facts shown by the record of its organization."

Fogg. v. Perris Irrg. District, 154 Cal. 209,
97 Pac. 316.

And the Supreme Court of Idaho has held to the same effect.

(Little Willow Irrigation District v. Haynes,
— Ida. —, 133 Pac. 906.)

With all other persons, the Appellee in this case was bound to take notice of the legal status of the districts, and of the fact that its directors were public officers and of all the limitations upon their authority in the execution of their duties and the trusts imposed upon them. Such officers can not by conduct raise an estoppel, equitable or otherwise, which shall foreclose and bind the property of the district. They could not even by specific contract charge a lien against the property in their care in the absence of express legislative authority.

They could not directly or indirectly admit others in to the control or administration of the trust imposed upon them. The district corporations were created for most important public work, to-wit, the appropriation of

the public waters of the state to the cultivation of its lands, with the ultimate purpose in view of furnishing homes for the people and developing the resources of the state. The state, itself, has declared the trust and appointed the trustee to administer it. As said by the Supreme Court of California in a case presenting questions fairly analogous to those in the case at bar:

“The trust thereby imposed upon the municipal government was public and could neither be delegated nor abdicated.”

(City of Oakland v. Oak. Front Co., 118 Cal. 160, 50 Pac. 277, 288.)

And the Supreme Court of Idaho has said:

“A contract by the board of directors of such a district, giving to others the management or control of any part of the system and taking that management out of the control of the hands of the district board, would be *ultra vires* and void.”

(Colburn v. Wilson, — Ida. —, 130 Pac. 381.)

The appellee, therefore, is conclusively charged with notice of all the acts of the directors of appellants in the matter of contracts for the construction and purchase of the irrigation system, together with all limitations upon their authority. It is familiar law that all persons dealing with municipal corporations (or other public officers), are charged with knowledge of the limitations upon the power of their officers.

“Since the authority of public officers can only be created by law, and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in assumed use. Their power and authority is specific and limited, not general, and their right to act in a spe-

cific instance must be ascertained and determined by an inspection of the law so created, strictly."

Abbott Municipal Corporations, Vol. 2, pp. 50-62;

Hughston v. Crane, 115 Cal. 404.

"A public corporation which has acquired property as a trustee for the public can not act in such a manner as to deprive the public or its individual members of their personal or collective rights in the use of that property.

The public corporation acts solely as a trustee; the community is regarded as a *cestui qui trust*. An action inconsistent with or contrary to this relation will be regarded as illegal."

(Abbott Munic. Corps., Vol. 3, Sec. 936, p. 2191.)

It knew, or should have known, that the contract made with the Company contemplated from time to time the conveyance of the completed portions of the work and the payment therefor of a specific sum of money in bonds at their par value, as the entire consideration for the system; that at the time it began to furnish materials, to-wit, the 14th of February, A. D. 1914, bonds in payment of the par value of \$520,315 had been delivered by or for the Company; that it could not, under the law, charge a lien against any portion of the system, and that its remedy, in default of the payment by the Construction Company, was an action upon the surety bonds required and given pursuant to the statute. It further knew, that the directors or other officers had no power to incur any debt or liability in excess of the express statutory provisions.

(Sec. 2392. "The board of directors, or other officers of the district, shall have no power to incur any debt or *liability* whatever, either by issuing

bonds or otherwise, in excess of the express provisions of this title; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void; provided, that for the purpose of organization or for any of the purposes of this title, the board of directors may, before the collection of the first assessment, incur any indebtedness not exceeding in the aggregate the sum of \$2,000, and may cause warrants of the district to issue therefor, bearing interest at 7%.”) Rev. Codes, Vol. 1, p. 1005.

There can be no question about the power of irrigation districts to negotiate for water systems in advance of their total completion. This is clearly evidenced in the language employed in Rev. Codes, Sec. 2386, authorizing the directors to acquire all lands and water rights and other property necessary for the construction, use and supply, etc., of canal or canals and works, “including canals and works constructed and being constructed by private owners.” Construing a similar statute, the Supreme Court of California said:

“By the use of the words ‘works constructed and being constructed,’ the legislature clearly indicated its intention to authorize districts to negotiate for water systems in advance of their total completion.”

Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248-251.

The conclusion is irresistible, it would seem, that no right of lien against the physical property of an irrigation district, necessary for the uses dedicated to the public, can be acquired by the means of an equitable estoppel founded upon the conduct—word or act—of the officers charged with the administration of the affairs of the district.

Such a right could not be asserted pursuant to an

express agreement by the officers of the districts. This must be true, since, in the last analysis, the assertion of the right involves, as in the instant case, a sale of the property to strangers to the trust. If it be said that the purchaser would be bound to administer the trust as directed by the law of its creation, the answer is, that a new trustee has been appointed by the act of the parties, and confirmed by the court, who is prohibited by law from intruding into the office.

“A contract by which officers and directors of an irrigation company attempted to divest themselves of the possession and control of the company’s property and to transfer it to individuals, is *ultra vires*.”

Arno Co-operative Irrg. Co. vs. Pugh,
Texas Appeals, 177 S. W. 991;
Colburn vs. Wilson, *supra*.

But, there is no authority given in the statutes relating to execution or foreclosure sales, to sell property of this class. If there were, the consequences would be far-reaching and irreparable. Necessarily the purchaser would be vested with a title to the physical property, and if the sale was to be effective he would have to acquire the franchises vested in the district to sell and distribute water. There is no authority in the law for the districts here to pay the money judgment given against their property, nor to redeem from a foreclosure sale with either bonds or money, since their powers in the matter of construction or purchase have been exhausted.

The theory of the court below, that, under the original contract with the Company, the appellants took title to the completed work subject to such liens as incumbered the property when it came into the possession and ownership of the Company, and that the Company acquired

title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction, is, with all deference be it said, unsound. It excludes from consideration the statutes which, as hereinbefore shown, do not give the lien, but on the contrary indicate unmistakably the intention of the legislature to preserve the property clear of liens of any kind.

The cases cited to sustain such conclusions, we think, do not support it.

(Greer vs. Cache Valley Canal Co., 4th Ida.
280; 38 Pac. 653;
Garland vs. Irrig. Co., 9 Utah 35; 34 Pac.
368;
Fosdick vs. Schall, 99 U. S. 235;
Holt vs. Henley, 232 U. S. 637.)

The cases from the state courts involved only the rights of lien against *private* corporations, and those in the supreme court only determined the status of the property passing by conditional sales with right of rescission in case of the failure of purchasers to complete the payments.

Upon the whole case, it is submitted, that the court below erred in adjudging a lien against the property of appellants and in directing a sale of said property and not dismissing plaintiff's bill of complaint; and appellants severally pray that the decree of said court be reversed, with directions to dismiss the bill of complaint of appellee—Portland Wood Pipe Company, as against each of appellants, and for costs.

Respectfully submitted,

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E. R. COULTER,

Solicitors for Crane Creek Irrigation District and Sunnyside Irrigation District, Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit

CRANE CREEK IRRIGATION DISTRICT, a Corporation, and SUNNYSIDE IRRIGATION DISTRICT, a Corporation, Appellants,
VS.
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**Brief of Appellee, Portland Wood
Pipe Company.**

*Upon Appeal from the United States District Court
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STATEMENT.

The brief of appellants herein sufficiently states the issue as framed by the pleadings. The facts which seem important to us on this appeal are as follows: On August 22, 1910, the Crane Creek Irrigation Land & Power Company, which for convenience we shall call the Crane Creek Company, owned certain water rights and rights of way including a reservoir site on Crane Creek in Washing-

ton County, Idaho, part of one ditch being built (trans., p. 80). The water rights had been acquired from the State of Idaho by Mr. E. D. Ford for the benefit of the Company (Ptffs.' Exhibit 12), and the rights of way were obtained either by deed from the owners of patented lands or by filing maps and applications in the United States Land Office under the Act of January 21, 1895 (28 Stat. L., p. 635), and the amendments thereto. (See Ptffs.' Exhibits 25-33, inclusive, 3, 4, 5, 6 and 13.)

On said date the Crane Creek Company entered into separate contracts with appellants for the sale and conveyance to them of an irrigation system to be constructed on these rights of way. Defendants, Crane Creek and Sunnyside Irrigation Districts' Exhibits "B," contained in the supplemental transcript, is the contract with the Sunnyside District and the contract with the Crane Creek District is identical, except as to the percentage of the system to be conveyed, the amount of bonds to be paid therefor and the amount of the indemnity bond to be provided.

Exhibit "B" provides for a conveyance of 35.26% of the system (Supplemental Trans., p. 9), a consideration of \$415,000.00 in bonds at their face value (p. 13), and an indemnity bond of \$100,000.00 (p. 23). The contract of the Crane Creek District provided for a 21.75% interest, a consideration of about \$240,000.00, and a \$75,000.00 indemnity bond. (Tr., p. 125.)

Sometime between the date of these contracts and May 29, 1913, the percentages to be conveyed to the

Districts were increased to 47.2% for the Sunnyside District and 22.4% for the Crane Creek District (Trans., p. 80) ; and it seems the amount of the consideration was also increased. (See trans., p. 73, and answers of Districts, par. 23, trans., pp. 53 and 68)

No work was done for over a year after making these contracts, and in September, 1911, the Crane Creek Company made a contract with appellee Maney Brothers & Co. to construct the reservoir contemplated for the project. Considerable work was done under this contract and then after another period of inactivity the Crane Creek Company on April 2, 1913, made a contract with Slick Brothers Construction Company under which the latter agreed to complete the construction of the irrigation system. From time to time after the execution of the contract last mentioned, the Crane Creek Company made certain deeds to the Sunnyside and Crane Creek Districts, respectively, which are abstracted in the transcript (pp. 138-183). These deeds were dated, respectively, May 29th, June 12th, September 1st, November 1st, and December 1st, 1913, and January 2nd, February 2nd, March 2nd, April 1st, May 1st, June 1st, July 1st, and August 15th, 1914.

The two deeds of May 29, 1913, were the only ones that were ever recorded and these were not recorded until November 19, 1914, after appellee Pipe Company had filed suit to foreclose its lien, and long after the claim of lien was placed of record in Washington County. The first four conveyances contain

the following paragraph, which seems wholly unintelligible (trans., p. 141) :

“It is covenanted and agreed that this conveyance, when all the work contemplated in that agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof shall have been fully completed and performed, which said dinal conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.”

In the later deeds this paragraph is amplified as follows (Trans., pp. 142-143) :

“It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, *shall be delivered up to the party of the first part for cancellation, together with those two certain conveyances dated May 29th, 1913, and June 12th, 1913, heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance* containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane

Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed.” (Our italics.)

The paragraph last quoted is carried through all the deeds which were given, but instead of obtaining a final conveyance from the Company as contemplated in such deeds the Districts recorded the conveyances first given, and the deeds of Aug. 15, 1914, still refer to a final conveyance to be given thereafter.

Appellee Portland Wood Pipe Company on February 9, 1914, entered into two contracts with Slick Brothers Construction Company, the original contractor on the work (ptffs.’ Exhibits 1A and 1B, trans., pp. 83-99) for the furnishing of material; and on February 14th appellee began delivering pipe to be used in the construction of this irrigation system, and such pipe was actually used and became a part of the project. At the time these contracts were made, and during the entire period appellee was furnishing this pipe, none of the deeds were of record. There was nothing in the contracts of appellee to lead it to suppose the Districts had any present interest in the system, and these contracts contained the following recital (trans., p. 83) :

“Whereas, the said Construction Company is about to install a pipe line for the carrying of water *on the project and lands of the Crane Creek Irrigation Land & Power Company*, at or near Crane Station in the County of Washington, State of Idaho, and desires to purchase from the said Pipe Company approximately twenty-one hundred and seventy-five (2175) feet of twenty (20) inch machine banded wire wound wood stave pipe for the purpose, said pipe to be delivered f. o. b. cars, Crane Station, Idaho, in accordance with the conditions hereinafter named.” (Our italics.) (See also trans., p. 89.)

The filing of appellee's lien on May 9, 1914, and within sixty days of the delivery of the last items, the actual furnishing of this pipe by appellee and the balance due it therefor are conceded, but the existence of a mechanic's lien for such material is denied.

Appellants suggest two questions: (1) Whether a material man's lien may be charged against the irrigation system of the Districts; and (2) Whether any part of the said property may be sold at public sale for the satisfaction of the alleged lien?

POINTS AND AUTHORITIES.

If the contracts of August 22, 1910, between the Crane Creek Company and the Irrigation Districts were construction contracts, wholly or in part, they were illegal, ultra vires and void, and the Districts can base no rights upon them.

Idaho Sess. Laws 1909, p. 165, Sec. 1.

Idaho Rev. Codes, Secs. 2396, 2386, 2404.

Hughson v. Crane, 115 Cal. 540, 47 Pac. 120.

Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24.

City of Nampa v. Nampa & Meridian Irr. Dist., 19 Ida. 779, 788, 115 Pac. 979.

The amendment to the irrigation district law, Laws 1913, Chap. 170, p. 542, had no retroactive effect and could not validate these contracts if originally void. These contracts were contracts to convey a completed system at a future time, and neither the completion of the system nor the performance of many of the other covenants and agreements could be specifically enforced in a court of equity.

Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248.

4 Pomeroy, Eq. Jur., Sec. 1405, 6 id. 760.

Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385, 390.

Farmers' L. & T. Co. v. Burbank P. & W. Co., 196 Fed. 539.

Not even an equitable interest vested in the Districts under these contracts until they were entitled to specific performance, and that could not be until after a final acceptance of the work by them.

Chappell v. McKnight, 108 Ill. 570.

Smith v. Jones (Utah), 60 Pac. 1104.

Bartlesville Oil Co. v. Hill, 30 Okla. 829,
124 Pac. 208.

Younkman v. Hillman, 53 Wash. 66, 102
Pac. 773.

The Districts held the Crane Creek Company out as owner of this property, and are estopped to deny such ownership as against appellee, which furnished material on the strength of such holding out.

Portland v. Inman-Poulson Lbr. Co. (Ore.)
133 Pac. 829, 46 L. R. A. (N. S.) 1211.

Boise City v. Wilkinson, 16 Ida. 150-178,
102 Pac. 148.

Chicago v. Union Stock Yards Co., 164 Ill.,
224, 35 L. R. A. 381.

Board, etc., of Arapahoe County v. Denver,
30 Colo. 13, 69 Pac. 586.

Hubbell v. City of South Hutchinson, 64
Kan. 645, 68 Pac. 52.

State of Indiana v. Milk, 11 Fed. 389.

Where the holder of the legal and record title is in possession of property and the vendee, under an unrecorded contract to convey, stands by and allows improvements to be made on the property under contract with such holder of the title, he cannot defeat a mechanic's lien based on such improvements by producing his contract or by obtaining an absolute conveyance from the vendor.

27 Cyc. 59.

Mellor v. Valentine, 3 Colo. 255, 258.

vs. Portland Wood Pipe Company, et al. 13

Pickens v. Plattsmouth Investment Co., 37
Neb. 272, 55 N. W. 947.

Lime, etc., Co. v. Pittsman, 161 Ill. App.
228.

The doctrine of relation cannot be invoked in favor of a vendee, under an executory contract of sale, who has obtained a deed so as to defeat the lien of a materialman whose lien has accrued while the vendor was in the apparent ownership and the actual possession of the property, because the doctrine of relation is never applied to the injury of innocent third parties.

1 Devlin, Real Estate, Sec. 264.

Jackson v. Bard, 4 Johns. 230, 4 Am. Dec.
267.

O'Neil v. Wabash Ave. Church, Fed. Cas.
No. 10531.

Mechanics' liens in favor of contractors and material men will be upheld against an entire irrigation system.

Bear Lake, etc., Co. v. Garland, 164 U. S.
1, 41 L. Ed. 327.

Continental, etc., Bank v. Corey Bros., 126
C. C. A. 84, 208 Fed. 976.

Nelson-Bennett Co. v. Twin Falls Land &
W. Co., 14 Ida. 5, 93 Pac. 789.

Smith v. Faris-Kesl Co., 27 Ida. —, 150
Pac. 25.

Mechanics' liens against quasi public corporations are valid where there has been no compliance with Laws 1909, p. 165.

Smith v. Faris-Kesl Co., *supra*.

Nelson-Bennett Co. v. Twin Falls L. & Water Co., *supra*.

Hill v. Twin Falls Land & Water Co., 22 Ida. 274, 127 Pac. 204.

Pacific Coast Pipe Co. v. Kings Hill Irr. & Power Co., U. S. D. C. Idaho, not reported.

Continental, etc., Bank v. Corey Bros., *supra*.

Irrigation districts are mutual co-operative corporations, organized for the benefit of the lands within their boundaries, and they acquire property subject to all incumbrances which burden it in the hands of their grantors.

Nampa & Meridian Irr. Dist. v. Briggs, 27 Ida. —, 147 Pac. 75.

Knowles v. New Sweden Irr. Dist., 16 Ida. 217, 101 Pac. 81.

City of Nampa v. Nampa & Meridian Irr. Dist., 19 Ida. 779, 787, 115 Pac. 979.

The Crane Creek Irrigation project is subject to sale on foreclosure as an entirety and in one parcel.

Smith v. Faris-Kesl Company, *supra*.

Continental, etc., Bank v. Corey Bros., *supra*.

ARGUMENT.

The Crane Creek Project did not become the property of Appellants until after Appellee's lien had vested.

The principal contention of appellants at the trial herein was that they were public corporations and that the Crane Creek Irrigation Project was dedicated to a public use, and could not be the subject of a mechanic's lien. The trial court declined to determine whether a mechanic's lien on the property of an irrigation district was valid, for two reasons, viz: (1) Because the material furnished by appellee was "for the construction of works belonging to the Power Company and not to the irrigation districts" (trans., p. 188), and the Districts acquired the property burdened with appellee's lien; and (2) Because the Districts had held the Power Company out as owner of the property and themselves as merely purchasers, and could not be permitted to change their position to the hurt of persons who, in good faith, dealt with the Power Company as such owner. The Court intimated, however, that a mechanic's lien on such property might be valid.

But the first question to be determined is: When and under what circumstances the irrigation system became the property of appellants? Their brief does not indicate whether they rely upon the contracts of August 22, 1910, as dedicating this project to a public use, or upon the conveyances beginning with May, 1913, and referred to in our Statement. The first of these possible positions is wholly untenable. Those

contracts did not even pass an equitable interest in the system, for they were merely contracts to convey the system when, or rather as, it should be constructed, and they were not capable of being specifically enforced in equity. It should be borne in mind that at the date of these contracts practically no construction work had been done and the entire project of reservoir, canals, pipe lines, laterals, etc., had to be created, and that it was impossible at that time to actually convey the irrigation system.

An analysis of this contract (Districts' Exhibit "B"), found in the supplemental transcript, shows clearly that there was no intention to convey a present interest, and that such contract was either illegal and void from the beginning, or else was merely a contract to convey an irrigation system to be constructed in the future and which gave no present right or interest in such system. The contract with the Crane Creek District was identical, except as to percentages and consideration. The contract (Exhibit "B"), after certain recitals, provides as follows:

"Whereas, for the consideration hereinafter stated, the Company hereby agrees to sell and agrees to convey, and the District hereby agrees to purchase and agrees to receive conveyance of that certain portion of said water rights, water appropriations, and rights of way more particularly hereinafter described, and that portion of such works and irrigation system as constructed, at the times and in the manner hereinafter par-

ticularly set forth; *and the Company, for said consideration, hereby agrees to convey to the District together with said portion of said water rights, water appropriations and rights of way, that certain portion of the reservoir, dams, canals, pipe lines, flumes, laterals and other works composing such irrigation system completed within the time and in the manner hereinafter particularly set forth.*" (Our italics.)

Although contained in the recital part of the contract, this paragraph is really the gist of the whole thing. The contract then recites the consideration and proceeds to enumerate numerous specific covenants on the part of both parties.

Paragraph II (p. 8) reads: "The property to be conveyed is (setting out a general description of the property)." How could any language be clearer to show that there was no intention of conveying an interest at the date of the instrument?

Paragraph VII (p. 12) provides for a conveyance of an interest in the reservoir and water rights on the execution of the contract, "excepting the right of possession thereof, which is to be held until final conveyance," and for the conveyance of portions of the system, as shown by monthly estimates, and for a final conveyance upon completion, "*together with the possession thereof;*" and the District agrees to turn over a proportionate amount of District bonds on receipt of these conveyances.

Paragraph XII (p. 14) provides that the District may accept partial conveyances without waiving its

right to object to imperfect work and to require full conveyance on completion; while paragraph XXIII (p. 22) provides for final acceptance before final conveyance.

Paragraph VIII (p. 13) provides for a consideration of \$415,000.00 in bonds at their par value (later increased to \$565,000.00, trans., p. 73). The consideration agreed to be paid by the Crane Creek District was about \$240,000.00. (See answer, p. 53.)

Paragraph XXVII (p. 23) provides for the execution of bonds in the sum of \$100,000.00, conditioned for the faithful performance of the terms of the agreement by the Company, for the construction of the works according to plans and specifications, and the completion and conveyance within the time specified, and for the maintenance of the system for a period of five years.

The bond to the Crane Creek District was to be \$75,000.00 (Sunnyside Ex. "S," trans., p. 125), but a later agreement provided for a joint bond of \$100,000.00.

In addition to the above, the Company makes a number of other covenants and agreements, which we will enumerate briefly. They are: That the system when completed shall conform to certain specifications (pp. 8 and 11); that the reservoir shall have a certain capacity (p. 11); that the Company will furnish material and build the dams, canals, etc. (p. 15); that it will build a telephone line (p. 15); that it will furnish 24,900 acre feet of storage water each season (p. 16); that it will reimburse the Dis-

tricts for interest paid on their bonds before completion (p. 17); that it will pay certain delinquent assessments (p. 21); that it will be responsible for damages arising during construction through accident or negligence (p. 23); and that it will convey an additional percentage of the system on certain conditions (p. 24).

The Districts agree to make delivery of district bonds at certain times to the amount of \$415,000.00 (p. 12); not to issue bonds against lands not benefited by the works (p. 17); to repay certain advances to the Company (p. 18); to make certain requirements as to lands annexed to the District (p. 20); and to adopt and enforce certain by-laws in regard to assessments on land held under public land entries (p. 21).

Appellants contend in their brief that the above contract and the similar contract with the Crane Creek District were contracts for construction and conveyance, but we think that they must be considered as contracts for conveyance only, whenever the construction shall have been completed. If they are contracts for construction, wholly or in part, the conclusion necessarily follows that they are illegal and void, and that neither the Districts nor the Crane Creek Company, who participated in the wrongful act of entering into these contracts, can base any rights upon them. Viewed as construction contracts, the bonds provided for in paragraph XXVII are wholly insufficient to comply with Laws 1909, page 165. This statute is quoted at length in appellants'

brief without its application in this particular being noticed. In fact they contend that the bond actually given was in compliance with this statute. The material portion of the statute is as follows:

“That hereafter any person or persons entering into a formal contract with the State, any county, city, town, school or irrigation district, or any quasi public corporation of the State, for the construction, alteration or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of \$200.00, shall be required, before commencing such work, to execute the usual penal bond, in a sum *equaling sixty per cent, at least, of the contract price*, to be approved by the officer, board or body authorized to make such contract, *with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; * * * .*” (Our italics.)

The contract price under the Sunnyside contract was \$415,000.00, and the Company agreed to furnish a bond of \$100,000.00 on this contract, or less than twenty-five per cent when the statute above set forth required sixty per cent. The total price on the two contracts at the time the bond was actually given was conceded to be in the neighborhood of \$800,000.00, and yet the Districts accepted a bond for \$100,000.00 only. Furthermore, a reference to this bond (Sunnyside Ex. “X”) shows that it was not conditioned

as required by the statute, for there is no provision in it that the contractor shall pay all claims of subcontractors, laborers and material men, as required by the statute.

The intent and purpose of this statute was to give such parties a remedy on the bond, and counsel for appellants in their brief have the assurance to suggest that the appellee should have sought its remedy on the bond. We hardly believe this contention could have been seriously made, for nothing can be plainer than that appellee would have no possible chance of recovering on such bond. The statute above referred to is a limitation on the power of irrigation districts to enter into construction contracts, and if this was wholly or in part a construction contract it is clear that it was illegal, *ultra vires* and void.

Under the Irrigation District law, as it stood at the date of the contracts in question, there was another limitation on the power of such corporations. They were authorized to issue bonds for two purposes, and only two, for the purchase of constructed works, and for sale to the highest bidder after notice.

Section 2396, Idaho Revised Codes, so far as it relates to this question, provides:

“As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations. in which it shall state what constructed works or other property it proposes to purchase and the

cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. * * *

Section 2386, Idaho Revised Codes, so far as material here, provides:

“In case of purchase (of works or property) the bonds of the District hereinafter provided for may be used to their par value in payment.”

Section 2404, relative to the disposition of irrigation district bonds, is as follows:

“The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this title. Before making any sale the board shall, by resolution, declare its intention to sell the specified amount of the bonds, and if said bonds can then be sold at their face value and accrued interest, they may be sold without advertisement, otherwise said resolution shall state the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least four weeks. * * * At the time appointed, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids * * * provided,

said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest."

These sections were adopted in 1903 from the California irrigation district law, and brought with them the construction they had received from the California courts, particularly in the case of *Hughson v. Crane*, 115 Cal., 404, 47 Pac., 120, decided in 1896, which decision was reaffirmed in *Leeman v. Perris Irrigation District*, 140 Cal., 540, 74 Pac., 24. These cases have been fully discussed in the brief of appellants in the case of *Maney Brothers & Co. v. Crane Creek Company*, Cause No. 2644, and we have nothing to add to that discussion.

The Idaho Supreme Court, in *City of Nampa v. Nampa & Meridian Irrigation District*, 19 Ida., 779, 788, 115 Pac., 979, gives a similar interpretation to the Idaho statutes, although the above cases are not cited. It follows from these authorities that at the time the contracts of August 22, 1910, were made there were but two ways to dispose of the bonds of an Idaho irrigation district, viz: They might be used at par in payment for property purchased, or they might be sold at par and accrued interest after due notice by publication. They could not be used at that date in payment to contractors for construction work.

It is true that the Idaho Legislature, by Laws 1913, Chap. 170, p. 542, granted to irrigation districts the power to use bonds directly for construction work, in the following language:

“Sec. 2404 A. In lieu of the sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this title, bonds authorized by the vote of the District for the purpose of acquiring or constructing irrigation works may be issued and delivered by the Board of Directors directly to the contractor in payment for such construction work, * * * ”

This act was approved March 12, 1913, and did not go into effect until May 11, 1913, after the Crane Creek Company had made its contract with Slick Brothers Construction Company for the completion of the system, and nearly three years after the contract now under discussion, upon which it could obviously have no effect. Those contracts must be interpreted in accordance with the law as understood when they were made, and the fact that it was necessary to pass a statute giving this right to irrigation districts shows clearly what the law was prior to such enactment.

After the California decisions above cited, it was held in *Stowell v. Rialto Irrigation District*, 155 Cal., 215, 100 Pac., 248, that an irrigation district had the right to purchase an irrigation system as constructed and pay for it in bonds of the District as portions of the system were conveyed. In comparing the rules laid down in that case with the contracts of August 22, 1910, it will be seen that such contracts are drawn in exact accordance with that decision, and the in-

ference is unavoidable that they were drawn in this way in order to come within such rules. Accordingly these contracts were in fact what they purport to be, namely, contracts to convey in sections, as the same should be completed, an irrigation system to be completed in the future. If they were contracts for construction, wholly or in part, and not contracts of purchase, they were in clear violation of the law as it stood prior to May 11, 1913, and, as shown by the above authorities, were for this reason wholly ultra vires and void, and the Districts who violated the law of their existence in making them cannot claim any rights thereunder.

While holding that these contracts were construction contracts, and not contracts of purchase, might invalidate the bonds issued by the Districts, it could not give the Districts any right against appellee and others who had a right to assume that the Districts were obeying the law. The result is, therefore, that these contracts are either void and of no effect, or else they are contracts for conveyance in the future.

What, then, is the effect of these contracts viewed as contracts to convey in the future? The ditches and other structures were not yet in existence when these contracts were made, and the duty to convey and the right to the conveyances rested upon the performance by the parties of the formidable array of mutual covenants and agreements which we have set out above, and which required a considerable period of time to perform. The most important of these covenants was the agreement to construct the

system, and none of them were of the nature to be specifically enforced.

It is elementary that courts of equity will not decree specific performance of construction contracts, or contracts requiring extended supervision during a period of time.

4 Pomeroy Eq. Jur., Sec. 1405.

6 Pomeroy Eq. Jur., Sec. 760.

Texas & Pac. Ry. Co. v. Marshall, 136 U. S.
393, 34 L. Ed., 385, 390.

Farmers' Loan & T. Co. v. Burbank P. &
W. Co., 196 Fed., 539.

In contracts to convey land, the equitable interest of the purchaser depends on whether he has a right to compel specific performance, and whether he is in a position to render full performance of his part. If there are agreements on the part of the vendor which a court of equity cannot enforce specifically, such as an agreement to do construction work, or if the purchaser has to do anything further than pay over a definite sum of money, specific performance of the contract will be refused and there is no equitable title unless and until specific performance can be decreed.

In *Chappell v. McKnight*, 108 Ill., 570, it is said:

“A mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement that may ripen into an equitable title.”

In *Smith v. Jones* (Utah), 60 Pac., 1104, the consideration for the purchase of mining property was to be paid out of mineral to be produced, and it was held that as the production of such mineral could not be compelled, the purchasers did not get an equitable title.

See also *Bartlesville Oil Co. v. Hill*, 30 Okla., 829, 124 Pac., 208, and *Younkman v. Hillman*, 53 Wash., 66, 102 Pac., 773, an interesting case.

In analyzing the contract, Exhibit "B," we have shown the mutual obligations of the parties, and it is clear that specific performance could not have been decreed against the Company until the system had been completed and finally accepted by the Irrigation Districts, and accordingly no equitable title could arise until that date.

In any event, these contracts provided for the retention of possession and the right to possession by the Crane Creek Company until final completion, and that Company was in possession of the property with all the indicia of ownership, and appellee is not chargeable with notice of any interest of the Districts in the system.

Section 5110, Idaho Revised Codes, is as follows:

"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other

structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; *and every contractor, sub-contractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter:* Provided, That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter.” (Our italics.)

Under this section, clearly the Crane Creek Company could charge the property in its possession with mechanics' liens, and appellee's contracts recited that the project belonged to the Crane Creek Company (trans., pp. 83 and 89). Not only was the Crane Creek Company in possession, but its engineers supervised the work and approved the specifications, attached to appellee's contract. Appellee had nothing whatever to do with the Districts. It contracted with Slick Brothers Company, which had contracted with the Crane Creek Company, which in turn had contracted with the Districts; and appellee was under no obligation to go back further than the Crane Creek Company, the party in possession and control of the property. In any event, however, an examination of the contracts would only have revealed that

the Irrigation Districts did not claim any present rights of ownership thereunder. These contracts and the actions of the Districts in connection therewith amounted clearly to a holding out of the Crane Creek Company as owner of the project, and the Districts cannot now defeat the just claims of those who relied on such apparent ownership and furnished the Crane Creek Company material, of which the Districts received the benefit.

In the language of the learned trial Judge (trans., p. 189) :

“Undoubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property.”

This statement must clearly control the case if an estoppel is ever possible against the officers of a quasi public corporation, like an irrigation district; and we are satisfied that such Districts have no peculiar privilege in regard to questions of estoppel not shared by States, counties, and other municipalities. The assertion in appellants' brief, at page 26, that “such officers (directors of an irrigation district) cannot by conduct raise an estoppel, equitable or otherwise, which shall foreclose and burden the property of the district,” is not supported by any citations of authority, and we submit that no cases can be found refus-

ing to apply the principle of estoppel in such a case as this.

The Districts had power to purchase a completed system from the Crane Creek Company. They held out to the world at large that they were doing just this, and by thus holding out they succeeded in getting the irrigation system constructed. Appellee furnished material on the faith of these representations, and the Districts cannot now be permitted to rejudiate them.

The authorities on estoppel are discussed in appellants' brief in the case of Maney Brothers v. Crane Creek Company et al., Cause No. 2644, and to avoid repetition we will merely enumerate the authorities here which sustain our position and the rule announced in *Portland v. Inman-Poulson Lumber Co., (Ore.)*, 133 Pac., 829, 46 L. R. A. (N. S.), 1211, as follows:

“There is not one rule of morals for a municipality and another for an individual.”

The other cases are:

Boise City v. Wilkinson, 16 Ida., 150-178,
102 Pac., 148.

Chicago v. Union Stock Yards Co., 164 Ill.,
224, 35 L. R. A., 381.

Board, etc., of Arapahoe County v. Denver,
30 Colo., 13, 69 Pac., 586.

Hubbell v. City of South Hutchinson, 64
Kan., 645, 68 Pac., 52.

State of Indiana v. Milk, 11 Fed., 389.

We have thus shown that the contracts of August, 1910, gave the Districts no interest or property in the irrigation system, and hence there was nothing to prevent the attaching of appellee's lien in the first instance. Nor can the deeds made to the Districts from time to time confer any rights as against appellee's lien, because none of these deeds were recorded when appellee made its contract, nor during all the time it was furnishing material, nor in fact until long after the claim of lien had been filed and this foreclosure action commenced. Besides, these conveyances show on their face that they were not intended as absolute and final conveyances, and that they were not to be recorded. This last provision was a secret arrangement between the Company and the Districts and the withholding of these instruments from record savors strongly of fraud. It certainly would be a great injustice to appellee if the Districts could now be permitted to rely on these conveyances.

Appellees' lien attached as against the Crane Creek Company, and it cannot be defeated by the conveyances to appellants.

We have shown above that this irrigation system did not become the property of the Irrigation Districts until after the lien of appellee had attached by the furnishing of materials under its contracts, and it follows that there could be no dedication of the property to a public use until after that time. This property being in the possession and control of the

Crane Creek Company, there can be no doubt as to the validity of the lien as against that Company. As the trial court said (trans., p. 188) :

“Very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished material for its construction.”

The Crane Creek Company had the legal title and possession of the property, and it had a perfect right to charge this property with mechanics' liens, notwithstanding the contracts of August 22, 1910, because these contracts contemplated the construction of the system and there was no provision in them requiring sub-contractors or parties doing work at the request of the Crane Creek Company to waive liens. We thus have a case where the vendor of real property has agreed with the vendee to construct improvements thereon, and both parties must be held to have consented that the property may be subjected to liens for such work.

In 27 Cyc., p. 59, it is said:

“Where the vendor in an executory contract of sale directly contracts for improvements, he thereby subjects his interest in the land to a mechanic's lien, and where the holder of an unrecorded bond for a conveyance stands by and sees work go on under a contract with the holder of the legal and record title, who is in possession, he cannot afterward defeat a lien by the production of such bond.”

In *Mellor v. Valentine*, 3 Colo., 255, 258, the court states:

“Jones, by his recorded deed, conveyed the fee to Young, and thereby held him out to the world as the owner of the premises sought to be charged with this lien.

“He cannot be permitted to stand by in silence and see the work go on, and afterward defeat the lien, or diminish Young’s estate by the production of Young’s unrecorded bond to re-convey. 1 Story’s Eq. Jur., 385, et seq; Phillips’ M. L., Sec. 225; *Higgins v. Furgeson*, 14 Ill., 269; *Donaldson et al. v. Holmes et al.*, 23 id., 88; *Wendall v. Rensselaer*, 1 Johns. Ch., 344; *Storrs v. Barker*, 6 id., 166; *Phillips v. Clark*, 4 Metc. (Ky.), 348.

“For the purposes of this lien, as against Jones and his grantees, Young must be treated as owner in fee of the property at the date of his contract for repairs.

“The fact that the contract for repairs was with Allen, as well as Young, does not affect the lien.

“If the contract be made with several parties, one of whom is the owner, it is sufficient. *Van Court v. Bushnell*, 21 Ill., 624; *Roach v. Chapin*, 27 id., 194.

“The legal effect of section 7 of the Lien Act of 1872 is to give the mechanic a lien from the date the labor was commenced, or the first of the materials furnished.

“The manifest object is to prevent wrong to the mechanic by alienations or incumbrances during the progress of the work. *Subsequent alienations or incumbrances are not prevented, but made subordinate to the right of the mechanics who, at the time, were engaged in working, and continued afterward to work under previous employment by the vendor.* Phillips’ M. L., Secs. 228-229; Monroe v. West, 12 Iowa, 119; Miller v. Kaufman et al., 14 Md., 173.” (Our italics.)

We think this case is squarely in point here. To the same effect are:

Pickens v. Plattsmouth Investment Co., 37 Neb., 272, 55 N. W., 947.

Lime, etc., Co. v. Pittsman, 161 Ill. App., 228.

It is now well settled that mechanics’ liens will arise as against an entire irrigation system by the furnishing of materials or the construction of all, or a part of, such system.

Bear Lake & River Water Works Co. v. Garland, 164 U. S., 1, 41 L. Ed., 327.

Continental, etc., Bank v. Corey Bros., 126 C. C. A., 84, 208 Fed., 976.

Nelson-Bennett Co. v. Twin Falls L. & W. Co., 14 Ida., 5, 93 Pac., 789.

Smith v. Faris-Kesl Co., 27 Ida. —, 150 Pac. 25.

In each of these cases a mechanic’s lien was upheld upon the entire irrigation system as against the

company contracting for the work, and its mortgagees. The lien being admittedly valid as against the Crane Creek Company, how can the conveyances made to the Districts operate to discharge such lien, when, by reason of the fact that none of the conveyances were recorded, appellee had no notice of the interests of the Districts? We think that the answer to this question must necessarily be that the lien is not defeated.

In the first place it is by no means clear that a sub-contractor's lien would not prevail against an irrigation district under Section 5111 of the Idaho Revised Codes, quoted in appellants' brief and relied upon by them. This section grants a lien against any "county, city, town, or school district," and was first enacted in Laws of 1893, p. 49. Irrigation Districts were at that time unknown to the statute law of Idaho, the first irrigation district law being some two years later, and the 1893 statute included every known variety of public or quasi public corporation, except the State.

Section 5150 provides:

"This title establishes the law of this State, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object."

The title referred to is the title on mechanics' liens, which includes Section 5111; and, giving this section even a fair construction, it would, we think, be held

to include irrigation districts. The validity of a lien against a district would, of course, be affected by Laws 1909, p. 165, referred to above. But where there has been no compliance with that statute, as in the present case, the District should not be allowed to obtain the property without seeing that it is paid for. The cases arising upon this statute have upheld mechanics' liens as against irrigation companies operating under the Carey Act, and appellants' attempted explanation of the decisions of the Supreme Court of Idaho, and this Court, on that question is wholly futile.

The lien referred to in the Nelson-Bennett case, quoted at page 19 of appellants' brief as being conferred by the Federal and State statutes, is a lien on the land of the settler for the price of his water right, and is granted to the construction company, and not to the contractor who builds the irrigation system, while the liens foreclosed in those cases were the mechanics' liens of a contractor or sub-contractor who was suing the construction company and seeking to change its interest in the irrigation system.

The most recent case on this subject is *Smith v. Faris-Kesl Construction Co.*, 27 Ida. —, 150 Pac. 25, which contains the following:

“The said appellant irrigation district assigns as error the action of the court in deciding that the right, title and interest of the Canyon Canal Company, Limited, or of its successor, the said appellant, could be subject to a mechanic's lien. Said appellant earnestly urges that works of a

public character are not subject to the mechanic's lien law, unless the statute shows clearly an intention on the part of the Legislature to include such works. The section of the statute granting a right to a mechanic's lien is 5110, Rev. Codes, and the part necessary to be considered in this connection is as follows:

“ ‘Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent. * * *’

“Such act is a part of title 4 of the Revised Codes, and we are admonished by the Legislature in section 5150, which is also a part of said title 4, as follows:

“ ‘This title established the law of this State, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object.’

“This question was before the court in case of *Nelson Bennett Co. v. Twin Falls Land & Water*

Co., 14 Idaho 5, 93 Pac. 789; and, while it is contended by counsel for the appellant that the questions here presented were not discussed by counsel or considered by the court in said case, an examination of the opinion of the court in that case indicates to the contrary, for therein it is said:

“ ‘An examination into the character and extent of the appellants’ interest in this property and these works is at once suggested by reason of the contention that it makes to the effect that a mechanic’s lien cannot be maintained against this property. The Land & Water Company has argued with much force and earnestness that it has no lienable interest in this property; that the entire property belongs to the State of Idaho and to the United States; that the canal system and the water and the entire works belong to the State of Idaho, and that the lands to be irrigated principally belong to the United States. Appellants contend that the only interest they have is that they may do this work and receive their pay, and that the law does not permit a lien either against the state or the general government.’ ”

“After discussing the laws pertaining to construction companies of the kind under consideration and the rights of such companies and their interests in and to canals and water systems by them constructed, and after considering at some length the contract entered into between said Twin Falls Land & Water Company and the State of Idaho, the court said:

“ ‘The foregoing are some of the numerous rights and interests we find provided and stipulated for in the contract entered into between the appellant corporation and the state. As to the legal effect of these various stipulations and provisions and the extent of the rights, title and interest acquired by the appellant corporation under them, we express no opinion, nor are we required in this case to determine * * * whether they are sufficient on which to found or rest a mechanic’s lien. That the Twin Falls Land & Water Company had, and still has, an interest in this canal system and the lands thereunder and the waters appropriated for their irrigation and reclamation, and that, under the statutes and decisions of this state, such property rights are real estate, there can be no doubt. * * * In this case there is no contention made that the lien claimant can acquire any greater right or interest under its lien than that owned and possessed by the Twin Falls Land & Water Company. * * * Under this enactment of the state Legislature, it is clear to us that the contractors and sub-contractors under a construction company like the appellant would be entitled to avail themselves of the benefit of the lien laws of the state, and that, in case of foreclosure and sale under the lien, they would be entitled to sell all the right, interest and claim of the construction company, and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests and privileges

of the construction company therein. * * * This lien extends only to the interest, claim and right of the Twin Falls Land & Water Company.'

"In this case the lien extends only to such right, title and interest as the Canyon Canal Company, Limited, had in the property at the time the lien of the respondent attached to it."

In the case last cited the project was constructed under the Carey Act, but the system was later conveyed to an irrigation district, and the irrigation district contested the validity of the lien. The court found no difficulty in sustaining the lien as against such district, or in ordering a sale of the property; and since the decision of the Supreme Court, above quoted, execution has actually issued in that case for the sale of the property of the District under the lien foreclosure.

Other cases upholding liens on Carey Act projects are:

Nelson-Bennett Co. v. Twin Falls L. & W. Co., 14 Ida. 5, 93 Pac. 789.

Hill v. Twin Falls Land & Water Co., 22 Ida. 274, 125 Pac. 204.

Pacific Coast Pipe Co. v. Kings Hill Irr. & P. Co. (U. S. District Court, Idaho, Southern Div., decided in December, 1911. Two cases; not reported.)

Continental, etc., Bank v. Corey Bros. Con. Co., 126 C. C. A. 84, 208 Fed. 976.

The effect of the sale under the lien foreclosure in the Pacific Coast Pipe Company case, *supra*, was before this court in Continental, etc., Bank v. Pacific Coast Pipe Company, Cause No. 2452, decided in May, 1915, but no contention was made there that there was any inherent impossibility in selling an irrigation system.

Cases like Pioneer Irrigation District v. Walker, 20 Idaho 605, 119 Pac. 307, cited by appellants, have dealt with irrigation districts in their governmental and not in their proprietary capacity and have no bearing on the question of mechanics' liens against these corporations.

In the recent case of Nampa & Meridian Irrigation District v. Briggs, 27 Ida. —, 147 Pac. 75, at page 82, the Supreme Court says of an irrigation district:

"It is a mutual co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district."

In Knowles v. New Sweden Irr. District, 16 Ida. 217, 225, 101 Pac. 81, the court says:

"The canal company could not sell any greater title than it possessed and when the irrigation district purchased, *it could neither purchase nor acquire any greater title or interest than its grantor owned and possessed. When it purchased this canal system, it purchased it subject to and burdened with the rights and equities of the appellant's grantor.*" (Our italics.)

The distinction between the proprietary and governmental capacity of an irrigation district is also illustrated by the case of *City of Nampa v. Nampa & Meridian Irr. District*, 19 Ida. 779, 787, 115 Pac. 979, in the following language:

“The question arises: Does the defendant, as an irrigation district, stand in any different situation from its predecessor? We think not. An irrigation district is a public *quasi* corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership. In the case at bar it has simply purchased the system of the Boise City Irrigation & Land Co., and it acquired in the streets of the city of Nampa only such rights as its predecessor had.”

These cases, and the case of *Smith v. Faris-Kesl Company*, *supra*, demonstrate beyond the possibility of a doubt that by transferring property to an irrigation district it is not released from mechanics' liens, mortgages, or other incumbrances upon the interest of the grantor, and, as said by this court in *Continental, etc., Bank v. Corey Brothers*, *supra*, (208 Fed., at page 983):

“We see no reason why these decisions are not binding on this court.”

It is conceded, and has been throughout this case, that the lien of appellee was good as against the Crane Creek Company, and as the Districts acquired the interest of that Company in this property, and no further or greater interest, they cannot escape the incumbrances with which it was burdened in the hands of that Company.

Property Subject to Sale as an Entirety.

In one paragraph of appellants' brief, at page 30, counsel urge that there is no authority given in the statutes relative to execution to sell property of the character of this irrigation system, and in their Assignments of Error they say it cannot be sold as an entirety and in one parcel. These objections do not seem to be urged with great seriousness, and we think they are conclusively met by the cases of *Smith v. Faris-Kesl Company* and *Continental, etc., Bank v. Corey Bros. Company*, *supra*. In the former case the trial court found (150 Pac. 28):

“That respondent was entitled to recover from Faris-Kesl Company said sums of money; also that he was entitled to a lien on the property described in the complaint (the entire irrigation system) for the sum of \$17,630.00, and that he was entitled to a decree foreclosing the same.* * *

Judgment and decree were entered in accordance with the findings of fact and conclusions of law.”

This decree was affirmed by the Supreme Court,

plaintiff has levied execution on the property of the irrigation district and is proceeding to sell the system.

In the latter case this Court said (208 Fed. 983) :

“It is urged that the court below erred in decreeing that the irrigation system be sold as a whole and without the right of redemption. *The court below had the power to make the decree, and it was its duty to do so if under existing circumstances the equity of the case required it.* In *Pacific Northwest Packing Co. v. Allen*, 116 Fed. 312, 54 C. C. A. 648, this court held in effect that, wherever the property and franchise described in a lien is so blended together and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair the value of the same to the serious detriment of both public and private interests, *the decree should be made for the sale of the same as an entirety and without redemption*, notwithstanding provisions of the state statutes where the property is situated allowing the redemption of real estate. That doctrine is well sustained by the decisions. *Farmers’ Loan & Trust Co. v. Iowa Water Co.* (C. C.), 78 Fed. 881; *National Foundry & Pipe Works v. Oconto Water Co.* (C. C.), 52 Fed. 43; *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111.” (Our italics.)

In the *Corey Brothers* case this Court upheld the lien upon a large Carey Act project. The case went back to the District Court, and the property was ac-

tually sold under the original decree affirmed by this Court.

How the Districts are to discharge this lien is a matter which they, and their learned counsel, should have considered when they were allowing their bonds to be sold at sixty per cent. of their par value and the proceeds of such sale to be paid to the Crane Creek Company and others, without seeing that such proceeds were applied entirely to discharging vested liens upon the property.

We think that it sufficiently appears from the foregoing argument that whatever interest these irrigation districts acquired in this system, either under their contracts with the Crane Creek Company or under the conveyances which were made thereafter and were not recorded, are subject to the lien of appellee, Portland Wood Pipe Company, and that the property is subject to sale as an entirety under the decree entered by the District Court.

Wherefore, appellee respectfully submits that the decree of the District Court foreclosing its lien upon the entire irrigation system of appellants and the Crane Creek Irrigation Land & Power Company, and ordering the sale of such system under foreclosure, should be affirmed.

Respectfully submitted,
RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Appellee,
Portland Wood Pipe Company;
Residence: Boise, Idaho.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

AETNA LIFE INSURANCE COMPANY,
a corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,
a corporation,

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the District Court of the United States
for the District of Oregon.

Filed

SEP 22 1919

No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

AETNA LIFE INSURANCE COMPANY,
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PORTLAND GAS & COKE COMPANY,
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Defendant in Error.

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

AETNA LIFE INSURANCE COMPANY,

a Corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,

a Corporation,

Defendant in Error.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

Senn, Eckwall & Recken, Yeon Building, Portland,
Oregon, for the Plaintiff in Error.

John A. Laing and H. W. Strong, Spalding Building,
Portland, Oregon, and John F. Logan, Mohawk
Building, Portland, Oregon, for the Defendant
in Error.

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To Portland Gas & Coke Company, greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the Aetna Life Insurance Company is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this seventeenth day of August in the year of our Lord, one thousand, nine hundred and fifteen.

R. S. BEAN, Judge.

Filed August 17, 1915.

G. H. MARSH, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth District.*

AETNA LIFE INSURANCE COMPANY,

a corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,

a corporation,

Defendant in Error.

WRIT OF ERROR.

The United States of America, ss.

The President of the United States of America.

To the Judge of the District Court of the United States for the District of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Portland Gas & Coke Company, a corporation, Plaintiff and Defendant in Error, and Aetna Life Insurance Company, a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and

openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 12th day of August, 1915.

(Seal) U. S. District Court,
District of Oregon.

G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

Filed August 12, 1915. G. H. Marsh, Clerk, United
States District Court, District of Oregon.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

March Term, 1915

Be it Remembered, That on the 5th day of May, 1915, there was duly filed in the District Court of

the United States for the District of Oregon, a Transcript of Record on Removal from the Circuit Court of the State of Oregon for Multnomah County, in words and figures, as follows, to wit:

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

PORTLAND GAS & COKE COMPANY,

a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff and for its first cause of action against the defendant, complains and alleges:

I.

That plaintiff is a corporation organized and existing under the laws of the State of Oregon, and from the 20th day of March, 1913, to the first day of January, 1914, was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings between the Willamette River and the Linnton Road in Multnomah County, Oregon, and employed a large number of men in such work.

II.

That the defendant is a corporation organized and existing under the laws of Connecticut, is engaged in general life, liability and accident insurance and has complied with the laws of Oregon with reference to foreign insurance companies transacting business within the State of Oregon.

III.

That on or about March 20th, 1913, the defendant, upon the request of the plaintiff and upon the payment by plaintiff to defendant of the premiums required, duly made, executed and delivered to plaintiff policy of insurance numbered "Policy No. E. 91221" entitled "Contractors Employer's Liability Policy," by which policy the defendant, in consideration of the premium provided in the policy, promised and agreed to indemnify the plaintiff against loss and/or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of the said construction work and business conducted by the plaintiff on said premises adjoining the Government Moorings, whether said injuries are accidentally suffered or alleged to have been suffered at the location or elsewhere, and to defend at its own cost any and all actions brought against the plaintiff to enforce a claim for damages covered by said policy; provided,

that the plaintiff forthwith forward to the defendant every summons or other process as soon as the same shall have been served upon it; that in said policy it was expressly provided that, subject to all agreements and conditions expressed therein, claims were covered whenever arising on account of accidents or alleged accidents occurring during the time said policy was in force.

IV.

That the term of said policy was for a period of six months, beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon and that by agreements duly made and endorsed on said policy, the said policy period was extended from time to time to noon of January 1st, 1914, and that said policy was in full force and effect during all such time.

V.

That in carrying on said construction work on said premises the plaintiff had water carried from certain sources of water supply in that vicinity for use by the employes of the plaintiff for drinking purposes in said construction work on said premises; that there was no drinking water on said premises and the carrying and furnishing of drinking water to its employes was incident in, and part of, the construction work carried on by said plaintiff on said premises.

VI.

That during a portion of the months of August and September, 1913, and while said policy of insurance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among others an employe by the name of Louis Weich, who was working for the plaintiff as a common laborer, excavating for concrete foundations, being one of the classified descriptions of business covered by said policy of insurance; that while so employed said Weich drank the water furnished him by the plaintiff; that on or about the 16th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that on or about the 15th day of January, 1914, commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that the water furnished him by the plaintiff herein was unwholesome and unfit for drinking purposes, and that the plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water but instead thereof delivered to him unwholesome water which was then and there impregnated with typhoid germs and wholly unfit for drinking purposes, and that the plaintiff herein well knew, or by the exercise of reasonable precaution should have known, that the water delivered to him was unwholesome and was impregnated with typhoid germs and was unfit for drinking purposes, and that by reason of his drinking such unwholesome water he contracted

typhoid fever, without any fault on his part, and then and there was rendered sick and was on the 16th day of September, 1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed for a long period, to-wit: three months, and was made sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and his mental system was permanently shattered and he was seriously and permanently injured in that his heart was inflamed and the valves and muscles thereof were wholly and permanently incapacitated from performing their normal functions and the lower limbs of Weich were benumbed and paralyzed and he alleged his damages at the sum of twenty thousand dollars (\$20,000.00) and demanded judgment against plaintiff herein for said sum.

VII.

That plaintiff immediately upon being served with summons and complaint in said action, forwarded to the defendant the summons and copy of complaint and all processes served upon it in said action, and called upon the defendant to defend such action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and/or expense arising or resulting from said claim of Louis Weich, as it had agreed to do under said policy of insurance, but that the defendant refused to defend such action and denied all liability therefor on the sole ground that

accidentally, and that therefore said policy did not cover such claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Weich upon proof of all the allegations of said complaint, that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Louis Weich and against the plaintiff herein in the sum of \$700.00 and his costs and disbursements; that thereafter plaintiff herein settled and compromised said judgment by paying to said Louis Weich in full settlement and compromise of said claim and said judgment the sum of \$600.00 on or about the 30th day of April, 1914; that the expense reasonably incurred by the plaintiff herein in the defense and settlement of said action and the actual loss and expense sustained and paid in money by plaintiff herein arising or resulting from said claim upon the plaintiff, including said sum paid to said Louis Weich, amounted to the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) and is itemized as follows:

Filing fee, less refund.....	\$ 2.90
Automobile hire.....	21.38
Attorneys' and Claim Agent's fees.....	588.00
Reporter's fees.....	232.90
Witness fees.....	75.70
Doctors' fees (expert testimony).....	160.00
Sum paid in compromise settlement.....	600.00

\$1680.88

That said sums were paid by the plaintiff between the dates of February 1st and April 30th, 1914, and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) together with interest thereon at the rate of six per cent. per annum from the 30th day of April, 1914, until paid, no part of which has been paid.

VIII.

That plaintiff has complied with all the conditions named in said policy on its part to be performed as conditions precedent to its right to bring this action insofar as said conditions could be complied with by it, in view of defendant's denial of liability and its refusal to defend said claim or to live up to its obligations under said policy, and that the above claim does not fall within any of these excepted claims mentioned in said policy and is within the limits of liability fixed by said policy and is a claim covered by said policy.

IX.

That the sum of one hundred sixty-eight dollars (\$168.00) is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a second cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this second cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of Joseph Duerst, who was working for the plaintiff as a common laborer at pile-driving, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed said Duerst drank the water furnished to him by the plaintiff, and that on or about the 30th day of September, 1913, he quit the employ of plaintiff on account of having contracted typhoid fever, and that on the 9th day of April, 1914, commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that between the first day of August, 1913, and the 30th day of September, 1913, he was employed by the plaintiff herein in and about the construction of said gas plant and factory, and that during all of said time, pursuant to his said employment, plaintiff herein undertook to deliver to him wholesome water for drinking purposes while he was engaged in said work, and that the plaintiff herein in utter

disregard of its duty and obligation to furnish him with wholesome water, carelessly and negligently failed to deliver to him wholesome drinking water and carelessly and negligently and without due consideration of his health, furnished and delivered to him for drinking water which was then and there impure, unwholesome, impregnated with disease germs and with typhoid fever germs and wholly unfit for drinking purposes and that the plaintiff well knew, or by the exercise of reasonable precaution should have known, that the water so delivered was impure and unwholesome and impregnated with disease germs and with typhoid germs and wholly unfit for drinking purposes; that he used said water so furnished by the plaintiff herein and by reason of drinking said water contracted typhoid fever and was thereby rendered sick and ill and was, on the said 30th day of September, 1913, confined to his bed and by reason of said illness and for a period of three months thereafter was sick, ill and incapacitated from said disease and compelled to remain in bed under the care of doctors and nurses and was disabled and his vitality and physical condition depleted to a considerable extent and that as a result of drinking said water and of contracting said disease he contracted psoriasis, and that his body and face have been as a result of the alleged negligence and carelessness of the plaintiff herein affected, blotched, discolored, disfigured and broken out in inflamed spots and sores and that he has become permanently disabled and unable to perform manual or

other labor, to his damage in the sum of twenty thousand (\$20,000.00) dollars, and that he has been compelled to expend one hundred twenty-seven dollars (\$127.00) for hospital bills and seventy-five dollars (\$75.00) for doctor bills, and he demanded judgment against the plaintiff herein for said sums.

III.

That plaintiff herein immediately upon being served with summons and complaint in said action, forwarded to the defendant the summons and copy of complaint and all processes served upon it in said action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and/or expense arising or resulting from said claim of Joseph Duerst as it had agreed to do under said policy of insurance, but that the defendant refused to defend said action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of such action; that it filed an answer denying all liability and that after said case was at issue the plaintiff herein settled and compromised said claim and said action by paying to said Joseph Duerst in full settlement and compromise of his said claim the sum of one hundred fifty dollars (\$150.00) on or about the 31st day of August, 1914; that the

expense reasonably incurred by the plaintiff herein in the defense and settlement and compromise of said action and the loss and expense sustained and paid in money by the plaintiff herein arising or resulting from said claim upon it, including said sum paid to Joseph Duerst amounted to the sum of two hundred sixty-two dollars and thirty cents (\$262.30) and is itemized as follows:

Settlement and compromise with Duerst....	\$150.00
Clerk's fees, less refund.....	0.95
Doctors' fees in examination.....	15.00
Attorney's and Claim Agent's fees.....	96.35
	<hr/>
	\$262.30

That said sums were paid between the dates of April 1st and August 31st, 1914, and that there is now due and owing to the plaintiff from the defendant said sum of two hundred sixty-two dollars and thirty cents (\$262.30) together with interest thereon at the rate of six per cent. per annum from the 31st day of August, 1914, no part of which has been paid.

IV.

That the sum of twenty-six dollars (\$26.00) is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a third cause of action against the defendant, complains and alleges:

I.

Plaintiff incorporates in this third cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during the months of July and August, and the first part of September, 1913, while said policy of insurance was in full force and effect the plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of C. Hastings, who was working for the plaintiff as a common laborer as stock and timekeeper, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Hastings drank the water furnished him by the plaintiff, and that on or about the 10th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein, in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Hastings that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known that the water was impure and unwholesome and impreg-

nated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 10th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff, unless the settlement was made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Hastings, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Hastings, but that the defendant denied all liability for said claim and refused to *having* anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the

sum of one hundred fifty dollars (\$150.00), which sum was paid unto said Hastings, on or about the first day of September, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of fifty dollars (\$50.00) in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of two hundred dollars, together with interest thereon at the rate of six per cent. per annum from December 1st, 1914.

IV.

That the sum of twenty dollars is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a fourth cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this fourth cause of action by reference thereto and makes a part hereof Paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance

was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of Otto Bush, who was working for the plaintiff as a carpenter, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Bush drank the water furnished him by the plaintiff, and that on or about the 8th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Bush that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid *typhoid* germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 8th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and

disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Bush, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Bush, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred dollars, which sum was paid unto said Bush on or about the first day of April, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of twenty-five dollars (\$25.00) in addition to said sum of one hundred dol-

lars and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of one hundred twenty-five dollars, together with interest thereon at the rate of six per cent. per annum from April 1st, 1914.

IV.

That the sum of twelve dollars and fifty cents is a reasonable sum for the court to allow for attorney's fees in this cause of action.

Plaintiff for a fifth cause of action against the defendant, complains and alleges:

I.

Plaintiff incorporates in this fifth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of George Harbick, who was working for the plaintiff as a common laborer in the insulation of electrical equipment, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Harbick drank the water

furnished him by the plaintiff, and that on or about the 11th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Harbick that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time, and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Harbick and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Harbick, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred twenty-five dollars, which sum was paid unto said Harbick on or about the first day of March, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars (\$25.00) in addition to said sum of one hundred twenty-five dollars and that there is now due and owing to the plaintiff from defendant on account of said claim the sum of one hundred fifty dollars, together with interest thereon at the rate of six per cent. per annum from March 1st, 1914.

IV.

That the sum of fifteen dollars is a reasonable sum

for the court to allow as attorney's fees in this cause of action.

Plaintiff for a sixth cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this sixth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of F. Kohl, who was working for the plaintiff as a common laborer engaged in road making, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Kohl drank the water furnished him by the plaintiff, and that on or about the 11th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Kohl that the water furnished him for drinking purposes by the plaintiff

herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes, and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time, and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Kohl, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Kohl, but that the defendant denied all liability for said claim and re-

fused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred fifty dollars, which sum was paid unto said Kohl on or about the 1st day of March, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars, in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said claim, the sum of one hundred seventy-five dollars, together with interest thereon at the rate of six per cent. per annum from March 1st, 1914.

IV.

That the sum of seventeen dollars and fifty cents is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a seventh cause of action against the defendant, complains and alleges:

I.

Plaintiff incorporates in this seventh cause of action by reference thereto and makes a part hereof

paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of I. M. Andrus, who was working for the plaintiff as a millwright in erecting the machinery for the briquetting plant, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed as such millwright said I. M. Andrus drank the water furnished him by the plaintiff and that on or about the 7th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever and that on or about the 13th day of February, 1914, he commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon for Multnomah County in which he alleged that the water furnished him by the plaintiff herein was unwholesome and unfit for drinking purposes, and that plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water but instead thereof delivered to him unwholesome and impure water which was then and there impregnated with typhoid germs and wholly unfit for drinking purposes and that the plaintiff herein knew, or by the exercise of reasonable care and caution should have known that the

water delivered to him was unwholesome and was impregnated with typhoid germs and was unfit for drinking purposes; that by reason of his drinking such unwholesome water he contracted typhoid fever without any fault on his part and was then and there rendered sick and was on said 11th day of September, 1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed and in the hospital for eleven and one-half weeks and that by reason of, and as a direct and proximate result of said careless and negligent act on the part of the plaintiff herein in furnishing said impure and unwholesome water he suffered great pain and mental anguish, suffered from *deliriu*, high fever and unconsciousness and that his brain, spinal cord, nerves and nervous system generally were poisoned and inflamed; that he suffered paralysis of certain muscles of his arms and legs and that he had toe drop in his left foot and an incomplete wrist drop in his right hand and was numb to pin prick over part of the back of his right hand and forearm and over the front of his left leg and ankle and that he was permanently injured and incapacitated from performing any work whatsoever; that he alleged his damages at the sum of twenty-five thousand dollars (\$25,000.00) with three hundred forty-seven dollars (\$347.00) special damages for hospital and doctor fees and demanded judgment against the plaintiff herein for said sum.

III.

That plaintiff immediately upon being served with summons and complaint in said action forwarded to the defendant a copy of said summons and complaint and all processes served upon it in said action, and called upon the defendant to defend said action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and/or expense arising or resulting from said claim of I. N. Andrus, as it had agreed to do under said policy of insurance; but that the defendant refused to defend such action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Andrus upon proof of all the allegations of said complaint, that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Andrus and against the plaintiff herein in the sum of fifty-five hundred dollars (\$5,500.00) and his costs and disbursements taxed at sixty-four dollars and ninety-five cents (\$64.95), that thereafter plaintiff herein appealed said case to the Supreme Court of the State of Oregon and while said appeal was pending a compromise settlement was made and effected between the plaintiff herein and said I. M. Andrus in

which said judgment and claim of said Andrus against the plaintiff herein was compromised and settled for the sum of sixteen hundred thirty-five dollars (\$1,635.00) on or about the 22nd day of March, 1915; that the expense reasonably incurred by the plaintiff herein in the defense of said action and in appeal to the Supreme Court and in the settlement thereof and the actual loss and expense sustained and paid in money by the plaintiff herein arising or resulting from said claim upon the plaintiff herein by said I. M. Andrus amounted to the sum of twenty-seven hundred eighty-five dollars and ninety-four cents (\$2,785.94) and is itemized as follows:

Fees in Circuit Court.....	\$ 9.15
Witness fees and expert testimony.....	90.00
Reporter's fees.....	150.70
Automobile expense.....	1.75
Appeal bond.....	27.50
Filing fee in Supreme Court and copy of transcript	28./48
Printed abstract and briefs in Supreme Court	82.16
Attorneys' and Claim Agent's fees.....	761.20
Amount paid in compromise settlement...	1635.00
	<hr/>
	\$2785.94

That said sums were paid by the plaintiff herein between the dates of February 13th, 1913, and March 22nd, 1915, and that there is now due and owing to

the plaintiff herein from the defendant on account of said claim said sum of twenty-seven hundred eighty-five dollars and nintey-four cents, together with interest thereon at the rate of six per cent. per annum from the 22nd day of March, 1915, until paid, no part of which has been paid.

IV.

That the sum of two hundred seventy-eight dollars and sixty cents is a reasonable sum for the court to allow as attorney's fees in this seventh cause of action.

WHEREFORE, plaintiff demands judgment against the defendant herein on its first cause of action for the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) with interest thereon at the rate of six per cent. per annum from April 30th, 1914, together with the sum of one hundred sixty-eight dollars (\$168.00) attorney's fees, for the sum of two hundred sixty-two dollars and thirty cents (\$262.30) with interest thereon at the rate of six per cent. per annum from the 31st day of August, 1914, together with the sum of twenty-six dollars (\$26.00) attorney's fees in the second cause of action; for the sum of two hundred dollars (\$200.00) with interest thereon at the rate of six per cent. per annum from December 1st, 1914, together with the sum of twenty dollars (\$20.00) attorney's fees, in the third cause of action; for the sum of one hundred twenty-five (\$125.00) with in-

terest thereon at the rate of six per cent. per annum from April 1st, 1914, together with the sum of twelve dollars and fifty cents (\$12.50) attorney's fees, in the fourth cause of action; for the sum of one hundred fifty dollars (\$150.00) with interest thereon at the rate of six per cent. per annum from March 1st, 1914, together with the sum of fifteen dollars (\$15.00) attorney's fees, in the fifth cause of action; for the sum of one hundred seventy-five dollars (\$175.00) with interest thereon at the rate of six per cent. per annum from March 1st, 1914, together with seventeen dollars and fifty cents (\$17.50) attorney's fees, in the sixth cause of action, and for the sum of twenty-seven hundred eighty-five dollars and ninety-four cents (\$2785.94) with interest thereon at the rate of six per cent. per annum from March 22nd, 1915, together with two hundred seventy-eight dollars and sixty cents (\$278.60) attorney's fees, in the seventh cause of action and for plaintiff's costs and disbursements incurred therein.

JOHN A. LAING,

JOHN F. LOGAN,

H. W. STRONG,

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah,—ss.

I, Geo. F. Nevins, being first duly sworn, depose and say: That I am Secretary of Portland Gas & Coke Company, a corporation, plaintiff in the foregoing action; that I have read the foregoing com-

plaint, know the contents thereof, and that the same are true as I verily believe.

GEO. F. NEVINS,

Subscribed and sworn to before me this 12th day of March, 1915.

(Notarial Seal)

H. E. MANGHUM,
Notary Public for Oregon.

“Endorsed.” Filed April 12, 1915.

JNO. B. COFFEY, Clerk.
WELLS, Deputy.

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

PORTLAND GAS & COKE COMPANY,
a corporation,
Plaintiff

vs.

AETNA LIFE INSURANCE COMPANY,
a corporation,
Defendant.

PETITION

To the Honorable, The Circuit Court of the State of Oregon for the County of Multnomah:

Your petitioner, the Aetna Life Insurance Company, respectfully shows to this court:

That it is the defendant in the above entitled action. That said action is of a civil nature and the matter in dispute in said action and cause exceeds the sum and value of three thousand dollars, exclusive of costs, to-wit: a sum of approximately six thousand dollars.

That the controversy herein is between citizens, inhabitants and residents of different states. That the said plaintiff above named, was at the time of the commencement of this action and ever since has been and still is, a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and is a citizen, resident and inhabitant of the state of Oregon, and your petitioner, Aetna Life Insurance Company, was at the time of the commencement of this action and ever since has been and still is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and is not a citizen, resident and inhabitant of the State of Oregon, but is a resident and citizen and inhabitant of the State of Connecticut.

That your petitioner desires to remove this action before the trial thereof into the next District Court of the United States, and within thirty days from the date of the filing of this petition, and your Petitioner offers herewith good and sufficient bond and surety for its entering into said District Court of the United States, within thirty days from the date of the filing of this petition, a copy of the record

in this cause and action and for paying the costs that may be awarded by the said District Court of the United States, if said District Court shall hold or find that this action or cause was wrongfully or improperly removed thereto and your petitioner herein prays that the said surety and bond herein may be accepted and that this action may be removed into said District Court of the United States as aforesaid, pursuant to the statutes of the United States, in such cases made and provided and that no further proceedings may be had herein in this court and that your Honorable court will make an order approving said bond and an order of removal of said action and to that end the defendant and your Petitioner will ever pray.

SENN, EKWALL & RECKEN,
Attorneys for Defendant & Petitioner.

State of Oregon,
County of Multnomah,—ss.

I, W. E. Pearson being first duly sworn, depose and say that I am one of the Managing Agents of the Defendant, Aetna Life Insurance Co. in the above entitled action; and that the foregoing petition is true as I verily believe.

W. E. PEARSON.

Subscribed and sworn to before me this 16th day of April, 1915.

(Notarial Seal)

LOUIS A. RECKEN,
Notary Public for the State of Oregon.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Petition is hereby acknowledged in Multnomah County, Oregon, this 17th day of April, 1915.

JOHN A. LAING,
One of the Attorneys for Plaintiff.

“Endorsed.”

Filed Apr. 17, 1915.

JNO. B. COFFEY,
Clerk.
WELLS,
Deputy.

*In the Circuit Court of the State of Oregon for
the County of Multnomah.*

PORTLAND GAS & COKE COMPANY,
a corporation,
Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,
a corporation,
Defendant.

NOTICE OF REMOVAL.

TO THE ABOVE NAMED PLAINTIFF and to your attorneys, John A. Laing, John F. Logan and H. W. Strong:

Please take notice that the above named defendant, the Aetna Life Insurance Company, has filed in

the Circuit Court of the State of Oregon, County of Multnomah its petition and bond for the removal of said action to the District Court of the United States for the District of Oregon and will apply to said court on the 17th day of April, 1915, at the hour of 9:30 o'clock in the forenoon of said day, or as soon thereafter as said defendant may be heard for an order of removal of said cause to the said District Court of the United States, and for the approval of said bond and a stay of further proceedings in this court.

SENN, EKWALL & RECKEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Notice of Removal is hereby accepted in Multnomah County, Oregon, this 17th day of April, 1915.

JOHN A. LAING,

One of the Attorneys for Plaintiff.

“Endorsed.”

Fuled Apr. 17, 1915.

JNO. B. COFFEY,
Clerk.

By WELLS,
Deputy.

*In the Circuit Court of the State of Oregon in and
for the County of Multnomah.*

PORTLAND GAS & COKE COMPANY,
a corporation,
Plaintiff.

vs.

AETNA LIFE INSURANCE COMPANY,
a corporation,
Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS,
That the Aetna Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having an office and place of business in the City of Portland, Multnomah County, Oregon, as principal; and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and authorized and empowered under the laws of the State of Oregon to become surety on bonds, and undertakings, are holden and stand firmly bound unto the Portland Gas & Coke Company, the plaintiff above named in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Portland Gas & Coke Company, the above named plaintiff, its successors, representatives and assigns, we bind ourselves, our representatives, successors and assigns, jointly and firmly by these presents.

Upon the condition nevertheless, that whereas the said plaintiff, Portland Gas & Coke Company has filed an action against the defendant Aetna Life Insurance Company, in the above entitled court, and the said defendant, Aetna Life Insurance Company has filed its petition with said Circuit Court of the State of Oregon, for the removal of said action to the District Court of the United States, for the District of Oregon.

Now if the said Aetna Life Insurance Company shall enter into said District Court of the United States, within thirty days from the date of the filing of the petition herein, a copy of the record in said action and shall well and truly pay all costs that may be made by said District Court of the United States, if said District Court, shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, We the said Aetna Life Insurance Company and The Aetna Accident & Liability Company have hereunto set our hands and seals this 16th day of April, 1915.

AETNA LIFE INSURANCE COMPANY,

W. E. Pearson, Managing Agent.

THE AETNA ACCIDENT & LIABILITY CO.

W. E. Pearson.

Its Resident Vice President.

Attest: Frank S. Senn,
Its Resident Asst. Secretary.
McCargar, Bates & Lively,
Its Local and General Agents.

By W. E. Pearson,
Member of Firm.

(The A. A. & L. Co.
Inc. Seal.)

State of Oregon.
County of Multnomah,—ss.

Due service of the within bond is hereby accepted
in Multnomah County, Oregon, this 17th day of
April, 1915.

JOHN A. LAING,
One of the Attorneys for Plaintiff.

“Endorsed.”

Filed Apr. 17, 1915.

JNO. B. COFFEY,
Clerk.

By WELLS,
Deputy.

BE IT REMEMBERED, That at a regular term
of the Circuit Court of the State of Oregon, for the
County of Multnomah, begun and held at the
County Court House in the city of Portland, in said
County and State on MONDAY, the 5th day of
April, A. D. 1915, the same being the first Monday
in said month, and the time fixed by law for hold-
ing a regular term of said court.

Present, Hons. John P. Kavanaugh, Robert G. Morrow, Henry E. McGinn, Geo. N. Davis and William N. Gatens and C. U. Gantenbein, Judges.

Whereupon, on this Saturday the 17th day of April, A. D. 1915, the same being the 12th Judicial day of said term of court, among other proceedings the following was had, to-wit:

*In the Circuit Court of the State of Oregon for
the County of Multnomah.*

PORTLAND GAS & COKE COMPANY,

a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a corporation,

Defendant.

ORDER

The defendant herein having within the time provided by law filed its petition for the removal of this action to the District Court of the United States for the District of Oregon and having at the same time filed its bond in the sum of \$500 with good and sufficient surety pursuant to statute and conditioned according to law and notice to plaintiff of this application having been given and the defendant appearing by its attorneys, Semm-Ekwall and Recken.

NOW THEREFORE this court does hereby accept and approve said bond and finding the facts set forth in said petition to be true does hereby order and decree that this action and cause be and the same is hereby removed into the District Court of the United States for the District of Oregon, and that all other or further proceedings of this action or cause in this court be and the same are hereby stayed and the clerk of this court is hereby directed to transmit forthwith to said District Court of the United States for the District of Oregon, a certified transcript of all the record herein.

Dated April 17th, 1915.

C. U. GANTENBEIN,
Judge of above entitled Court.

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

State of Oregon,
County of Multnomah,—ss.

I, Jno. B. Coffey, County Clerk and ex-officio clerk of the Circuit Court of the State of Oregon in and for the County of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries constitutes the entire record together with the notice of Removal and undertaking on removal in the case of Portland Gas & Coke Company, a corporation, plaintiff vs. Aetna Life Insurance Company, a corporation, defendant,

have been by me compared with the originals thereof, and that they are true and correct transcripts of such original Pleadings, Papers, Orders, Journal Entries, Notice of Removal and Undertaking on Removal as the same appear of record and on file at my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court the 5th day of May, 1915.

JNO. B. COFFEY, Clerk.

By J. H. BUSH, Deputy.

(Seal)

Transcript on Removal Filed May 5, 1915.

G. H. MARSH,

Clerk United States District Court, District of Oregon.

And afterwards, to-wit, on the 18th day of May, 1915, there was duly filed in said court, and cause a Demurrer in words and figures as follows, to-wit:

DEMURRER TO COMPLAINT.

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

SENN, ECKWALL & RECKEN,

Attorneys for defendant.

I, F. S. Senn, one of the attorneys for the defendant hereby certify that the foregoing demurrer is made in good faith, and is not made for the purpose of hindering or delaying the trial of the above entitled action, and I believe that the point raised by said demurrer is well taken.

F. S. SENN.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Demurrer is hereby accepted in Multnomah County, Oregon, this 18th day of May, 1915.

H. W. STRONG,
One of the Attorneys for Plaintiff.

Filed May 18, 1915.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on Monday, the 21st day of June, 1915, the same being the 98th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER OVERRULING DEMURRER.

This cause was heard upon the demurrer to the complaint herein and was argued by Mr. J. A. Laing, Mr. John F. Logan and Mr. H. W. Strong,

of counsel for the plaintiff, and by Mr. F. S. Senn, of counsel for the defendant; on consideration whereof, it is ORDERED and ADJUDGED that said demurrer be, and the same is hereby overruled.

And afterwards, to-wit, on the 21st day of June, 1915, there was duly filed in said court and cause, an Opinion, in words and figures as follows, to-wit:

OPINION ON DEMURRER.

Portland, Oregon, Monday, June 21, 1915.

R. S. BEAN, D. J., (ORAL)

The case of the Portland Gas & Coke Company vs. the *Aetna* Life Insurance Company is an action on an indemnity policy by which the company agreed to indemnify the plaintiff against loss and (or) expense arising or resulting from claim upon the assured for damages on account of bodily injuries and (or) death accidentally suffered by an employe.

Certain employes of the plaintiff company contracted typhoid fever from water furnished for their use by the plaintiff. They brought actions against the plaintiff company and recovered damages on account thereof, and the question for decision in this case is whether that constitutes a bodily injury accidentally received or suffered within the meaning of this policy.

It will be observed that the language of this policy is exceedingly broad. It differs from many indemnity policies in that liability is not limited to injuries received from external violence nor to accidents which result in producing visible external marks or injuries, or evidence of violence, but it is a broad indemnity against injuries resulting from accidental causes.

Now, the English Workman's Compensation Act of 1897 provided for compensation to workmen for personal injury by accident arising in the course of their employment. While a workman was engaged in sorting wool a bacillus passed from the wool to his eye, afflicting him with anthrax from which he died. On appeal to the Privy Counsel it was held that the injury was due to an accident within the meaning of this law, because first it was an accident that the bacillus happened to be in the wool; second, it was an accident that it settled on the workman in a delicate or tender spot, and third, it was an accident that the poison found its way into the workman's system and caused his death. And therefore the court held that the case came within the Compensation Act. On the same reasoning it could be properly held in this case that the injury here was an accident because it was an accident that the typhoid germs happened to be in the water furnished the plaintiff's employes, and, second, it was an accident that the germ found favorable opportunity for development in the workmen.

A similar ruling was announced by the Supreme Court of Massachusetts in *Hood vs. Maryland Casualty Company*, 206 Mass. The policy in that case provided indemnity against loss from liability for damages on account of bodily injuries accidentally suffered, similar to the policy under consideration. The employe was a hostler and in the course of his employment he contracted glanders, through negligence of his employer. The court held the insurance company liable because the infection which caused the disease was due to accident.

So also in the case of the *Columbia Paper Company vs. the Fidelity & Casualty Company*, 104 Mo. Ap., a policy similar to the one now in controversy. The employe contracted a kidney disease by handling infected wool rags, and the court held it was within the terms of the policy, and the insurance company liable.

It is sought to distinguish these cases from the one at bar because it is claimed that in the cases referred to there was an abrasion of the body through which the poison entered the system, but, as stated in the English case, that fact is immaterial because it was a mere fortuitous accident that it came in contact with this particular spot, and where some affliction of our physical frame is in any way induced by accident, we should be on our guard that we are not misled by medical phrases to allow the proper application of the

phrase accident causing the injury, because the injury inflicted by the accident sets up a condition of things which medical men denominate disease.

Under these circumstances, and they seem to be directly in point, I conclude that the injuries referred to in the complaint come within the terms and provisions of this policy, and the demurrer should be overruled.

And afterwards, to-wit, on the 12th day of July, 1915, there was duly filed in said court and cause, an Answer in words and figures as follows, to-wit:

ANSWER.

Comes now the defendant above named and for answer to plaintiff's first cause of action in the complaint on file herein, admits, denies and alleges, as follows, to-wit:

I.

Admits paragraph one and two of said complaint.

II.

Admits that on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon payment by the plaintiff to the defendant of the premium required, duly made, executed and delivered to the plaintiff a policy of insurance, said

policy, being numbered E-91221, entitled Contractor's Employers Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and/or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employess of the plaintiff, by reason of said construction work and business conducted by the plaintiff on plaintiff's premises, adjoining the Government Moorings.

III.

Admits paragraph 4 of said first cause of action.

IV.

Admits that plaintiff furnished water to its employees.

V.

Admits paragraph 6 of said first cause of action, in said complaint.

VI.

Admits that plaintiff immediately upon being served with summons and complaint by Louis Weich, forwarded to the defendant copy of said summons and complaint and called upon defendant to defend said action in the name and on behalf of the plaintiff.

Defendant admits that it refused to defend said action on the ground that said claim did not arise from bodily injuries accidentally suffered and that the policy of insurance referred to in plaintiff's first cause of action did not cover such claims.

Defendant admits that said Louis Weich secured a verdict against plaintiff for the sum of \$700.00 and admits that said verdict was settled for \$600.00 on or about the 30th day of April, 1914, and admits that said \$600.00 was paid by this plaintiff to said Louis Weich.

Defendant admits that said \$600.00 was paid between February 1st, and April 30th, 1914, but this defendant denies each and every other allegation, matter and thing contained in paragraph seven of plaintiff's first cause of action, and the whole thereof.

VII.

Defendant denies paragraph eight and nine of said first cause of action, and the whole thereof, and denies every allegation in said first cause of action, except such allegations as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's first cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plain-

tiff was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the first day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is engaged in general life, accident and liability insurance and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff a policy of insurance, Numbered Policy no. E-91221 entitled Contractors Employers Liability Policy by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and/or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an em-

ployee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said Louis Weich, mentioned in plaintiff's first cause of action, alleges that he contracted typhoid fever by reason of drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's first cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said Louis Weich.

WHEREFORE defendant prays that plaintiff's first cause of action be dismissed and that plaintiff take nothing by reason thereof and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's second cause of action, in said complaint on file herein, this defendant admits, denies and alleges as follows, to-wit:

I.

Answering paragraph 1 of said second cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, said paragraphs being

incorporated in and made a part of said second cause of action.

II.

Answering paragraph 3 of said first cause of action, which said paragraph 3 was and is incorporated in said second cause of action, this defendant admits that on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon payment by the plaintiff to the defendant of the premium required duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employer's Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and/or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plaintiff on plaintiff's premises, adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said second cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action, was incorporated in and made a part of said second cause of action.

VI.

Defendant admits paragraph 2 of said second cause of action.

VII.

Admits that plaintiff immediately upon being served with summons and complaint of Joseph Duerst, forwarded to the defendant copy of said summons and complaint and called upon the defendant to defend said action in the name and on behalf of the plaintiff.

Defendant admits that it refused to defend said action on the ground that said claim did not arise from bodily injuries accidentally suffered and that the policy of insurance referred to in plaintiff's first cause of action did not cover such claims.

Defendant admits that said action was settled by the payment of the sum of one hundred and fifty

dollars, and admits that plaintiff paid to said Joseph Duerst the sum of one hundred and fifty dollars.

Defendant admits that said \$150.00 was paid between the dates of April 1st and August 31st, 1914, but this defendant denies each and every other allegation, matter and thing contained in paragraph 3 of plaintiff's second cause of action, and the whole thereof.

VIII.

Defendant denies paragraph 4 of said second cause of action, and the whole thereof, and denies each and every allegation in said 2nd cause of action and the whole thereof, except such allegation as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's second cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings, between the Willamette River and the Linnton Road, in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of Connecticut, and is engaged in general life, accident and liability insurance business in the State of Oregon and has complied with the laws of Oregon, relating to foreign insurance companies transacting business in Oregon.

III.

That on or about March 20th, 1913, defendant made, executed and delivered to plaintiff a policy of insurance numbered E-91221, entitled Contractors Employers Liability Policy by which policy defendant in consideration of a premium paid by plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of plaintiff by reason of plaintiff's construction of a gas plant near Linnton, Oregon. That said Joseph Duerst mentioned in plaintiff's second cause of action alleges he contracted typhoid fever by reason of drinking certain contaminated water furnished him by plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's second cause of action. That said policy does not cover typhoid

fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursements or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said Joseph Duerst.

WHEREFORE, defendant prays that plaintiff's second cause of action be dismissed and that plaintiff take nothing by reason thereof and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's third cause of action, in said complaint contained, this defendant admits, denies and alleges as follows:

I.

Answering paragraph 1 of said third cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, which said paragraphs 1 and 2 of said first cause of action, are incorporated in and made a part of said third cause of action.

II.

Answering paragraph 3 of said first cause of action, which said paragraph 3 was and is incorporated in said second cause of action, this defendant admits that on or about March 20th, 1912, the defendant upon the request of the plaintiff and upon

payment by the plaintiff to the defendant of the premium required duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employer's Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and/or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plaintiff on plaintiff's premises adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said third cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action was incorporated in, and made a part of said third cause of action.

VI.

Admits paragraph 2 of said third cause of action.

VII.

Admits that plaintiff immediately upon learning of said case of typhoid fever, notified defendant of said claim being made upon it by said Hastings, and called upon the defendant to indemnify the plaintiff against said claim of said Hastings.

Admits that it refused to indemnify plaintiff by reason of said claim, on the ground that said claim did not arise from bodily injuries, accidentally suffered and that the policy of insurance referred to in plaintiff's third cause of action did not cover such claim.

Defendant admits that said claim was settled by the payment of the sum of one hundred and fifty dollars on or about the 1st day of September, 1914, but this defendant denies each and every other allegation, matter and thing contained in paragraph 3 of plaintiff's third cause of action, and the whole thereof.

VIII.

Defendants denies paragraph 4 of said third cause of action, and the whole thereof, and denies each and every allegation in said third cause of action and the whole thereof, except such allegations as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's third cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the first day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is engaged in general life, accident and liability insurance, in the State of Oregon, and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff a policy of insurance Numbered Policy No. E-91221,

entitled Contractor's Employer's Liability Policy, by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said C. Hastings, mentioned in plaintiff's third cause of action claimed that he contracted typhoid fever by reason of drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered, and does not come within the purview of the policy mentioned in plaintiff's third cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance, this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said C. Hastings.

WHEREFORE defendant prays that plaintiff's third cause of action be dismissed and that plaintiff take nothing by reason thereof, and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's fourth cause of action, in said complaint on file herein, this defendant admits, denies and alleges as follows, to-wit:

I.

Answering paragraph 1 of said fourth cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, which said paragraphs 1 and 2 of said first cause of action are incorporated in and made a part of said fourth cause of action.

II.

Answering paragraph 3 of said first cause of action, which said paragraph 3 was and is incorporated in, said fourth cause of action, this defendant admits that on or about March 20th, 1913, the defendant upon request of the plaintiff and upon payment by the plaintiff to the defendant of the premium required duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employer's Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and/or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plain-

tiff on plaintiff's premises adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said fourth cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action was incorporated and made a part of said fourth cause of action.

VI.

Admits paragraph 2 of said fourth cause of action.

VII.

Admits that plaintiff immediately upon learning of said case of typhoid fever, notified defendant of said claim, being made upon it by the said Otto Bush, and that said plaintiff called on defendant to indemnify the plaintiff against said claim of said Bush.

Admits that it refused to indemnify plaintiff by reason of said claim on the ground that said claim did not arise from bodily injuries accidentally suffered and that the policy of insurance referred to in plaintiff's fourth cause of action, did not cover such claim.

Defendant admits that said claim was settled by the payment of the sum one hundred dollars on or about the 1st day of April, 1914, but this defendant denies and every other allegation, matter and thing contained in paragraph 3 of said fourth cause of action, and the whole thereof.

VIII.

Defendant denies paragraph 4 of said fourth cause of action, and the whole thereof, and denies each and every allegation in said fourth cause of action and the whole thereof, except such allegation as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's fourth cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March,

1913, to the first day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings, between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is engaged in general life, accident and liability insurance in the State of Oregon, and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff, a policy of insurance, Numbered Policy No. E-91221, entitled Contractor's Employer's Liability Policy, by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said Otto Bush, mentioned

in plaintiff's fourth cause of action, claimed he contracted typhoid fever by reason of drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's fourth cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said Otto Bush.

WHEREFORE defendant prays that plaintiff's fourth cause of action be dismissed and that plaintiff take nothing by reason thereof, and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's fifth cause of action, in said complaint, on file herein, this defendant admits, denies and alleges as follows, to-wit:

I.

Answering paragraph 1 of said fifth cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, which said paragraphs 1 and 2 said first cause of action are in-

corporated in and made a part of said fifth cause of action.

II.

Answering paragraphs 3 of said first cause of action, which said paragraph 3 was and is incorporated in said fifth cause of action, this defendant admits that on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon payment by the plaintiff to the defendant of the premium required duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employer's Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plaintiff on plaintiff's premises adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said fifth cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action, was incorporated in and made a part of said fifth cause of action.

VI.

Admits paragraph 2 of said fifth cause of action.

VII.

Admits that plaintiff immediately upon learning of said case of typhoid fever, notified defendant and immediately upon learning of the claim being made by said Harbick, notified the defendant, and that said plaintiff called on defendant to indemnify the plaintiff against said claim *if* said Harbick.

Admits that it refused to indemnify plaintiff by reason of said claim on the ground that said claim did not arise from bodily injuries, accidentally suffered and that the policy of insurance referred to in plaintiff's fifth cause of action, did not cover such claim.

Defendant admits that said claim was settled by the payment of the sum of one hundred and twenty-

five dollars on or about March 1st, 1914, but this defendant denies each and every other allegation, matter and thing contained in paragraph 3 of the said fifth cause of action, and the whole thereof.

VIII.

Defendant denies paragraph 4 of said fifth cause of action, and the whole thereof, and denies each and every allegation in said fifth cause of action and the whole thereof, except such allegations as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's fifth cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the first day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings, between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly or-

ganized and existing under and by virtue of the laws of the State of Connecticut and is engaged in general life, accident and liability insurance in the State of Oregon and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff, a policy of insurance numbered Policy No. E-91221, entitled Contractor's Employer's Liability Policy, by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said George Harbick mentioned in plaintiff's fifth cause of action, claimed he contracted typhoid fever by reason of drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's fifth cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the

plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said George Harbick.

WHEREFORE defendant prays that plaintiff's fifth cause of action be dismissed and that plaintiff take nothing by reason thereof and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's sixth cause of action, in said complaint on file herein this defendant admits, denies and alleges as follows, to-wit:

I.

Answering paragraph 1 of said sixth cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, which said paragraphs 1 and 2 of said first cause of action are incorporated in and made a part of said sixth cause of action.

II.

Answering paragraph 3 of said first cause of action, which said paragraph 3 was and is incorporated in said sixth cause of action, this defendant admits that on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon payment by the plaintiff to the defendant of the

premium required, duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employers Liability Policy, by which policy, this defendant agreed to indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plaintiff on plaintiff's premises adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said sixth cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action, was incorporated in and make a part of said sixth cause of action.

VI.

Admits paragraph 2 of said sixth cause of action.

VII.

Admits that plaintiff immediately upon learning of said case of typhoid fever notified defendant and immediately upon learning of the claim being made by said Kohl, notified the defendant and that said plaintiff called on defendant to indemnify the plaintiff against said claim of said Kohl.

Admits that it refused to indemnify plaintiff by reason of said claim on the ground that said claim did not arise from bodily injuries, accidentally suffered, and that the policy of insurance referred to in plaintiff's sixth cause of action, did not cover such claim.

Defendant admits that said claim was settled by the payment of the one hundred and fifty dollars on or about March 1st, 1914, but this defendant denies each and every other allegation, matter and thing contained in paragraph 3 of said sixth cause of action and the whole thereof.

VIII.

Defendant denies paragraph 4 of said sixth cause of action and the whole thereof, and denies each and every allegation of said sixth cause of action and the whole thereof, except such allegations as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's sixth cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the first day of January, 1914, plaintiff was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings, between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is engaged in general life, accident and liability insurance in the State of Oregon and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff, a policy of insurance numbered Policy No. E-91221, entitled Contractor's Employer's Liability

Policy, by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said F. Kohl, mentioned in plaintiff's sixth cause of action, claimed he contracted typhoid fever by reason of drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's sixth cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff because of the acts or actions of said F. Kohl.

WHEREFORE defendant prays that plaintiff's sixth cause of action be dismissed and that plaintiff take nothing by reason thereof, and that defendant be awarded its costs and disbursements herein.

For answer to plaintiff's seventh cause of action in said complaint on file herein, this defendant admits, denies and alleges as follows, to-wit:

I.

Answering paragraph 1 of said seventh cause of action, this defendant admits paragraphs 1 and 2 of the first cause of action, which said paragraphs 1 and 2 of said first cause of action, are incorporated in and made a part of said seventh cause of action.

II.

Answering paragraphs 3 of said first cause of action, which said paragraph 3 was and is incorporated in said seventh cause of action, this defendant admits that on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon payment by the plaintiff to the defendant of the premium required, duly made, executed and delivered to the plaintiff a policy of insurance, said policy being numbered E-91221, entitled Contractor's Employer's Liability Policy, by which policy this defendant agreed to indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of said construction work and business conducted by the plaintiff on plaintiff's premises adjoining the Government Moorings.

III.

Defendant admits paragraph 4 of said first cause

of action, which said paragraph 4 of said first cause of action was incorporated in and made a part of said seventh cause of action.

IV.

Defendant admits that plaintiff furnished water to its employees.

V.

Defendant denies paragraph 8 of said first cause of action, which said paragraph 8 of said first cause of action, was incorporated in and made a part of said seventh cause of action.

VI.

Defendant admits paragraph 2 of said seventh cause of action.

VII.

Admits that plaintiff immediately upon being served with summons and complaint by I. M. Andrus, forwarded to the defendant a copy of said summons and complaint and called upon the defendant to defend said action in the name and on behalf of the plaintiff.

Defendant admits that it refused to defend said action on the ground that said claim did not arise from bodily injuries accidentally suffered and that the policy of insurance referred to in plaintiff's seventh cause of action did not cover such claim.

Defendant admits that said I. M. Andrus secured a verdict against plaintiff for the sum of \$5500.00 and admits that said verdict was settled for \$1635.00 on or about the 22nd day of March, 1915, and admits that \$1635.00 was paid said I. M. Andrus.

Defendant admits that said sum of \$1635.00 was paid between February 13th, 1913, and March 22nd, 1915, but this defendant denies each and every other allegation matter and thing contained in paragraph 3 of said seventh cause of action, and the whole thereof.

VIII.

Defendant denies paragraph 4 of said seventh cause of action and the whole thereof, and denies each and every allegation of said seventh cause of action and the whole thereof, except such allegations as are herein specifically admitted.

For a first, separate and further answer and defense to plaintiff's seventh cause of action, this defendant alleges:

I.

That during all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the first day of January, 1914, was engaged in the construction of a gas plant and

works on its property adjoining the Government Moorings, between the Willamette River and the Linnton Road in Multnomah County, Oregon, and in such work, employed a large number of men.

II.

That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and is engaged in general life, accident and liability insurance in the State of Oregon and has complied with the laws of Oregon, with reference to foreign insurance companies transacting business in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered to the plaintiff a policy of insurance numbered, Policy No.-E91211, entitled Contractor's Employer's Liability Policy, by which policy the defendant in consideration of a premium paid by the plaintiff agreed to indemnify the plaintiff against loss and or expense arising or resulting in claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of the plaintiff's construction of a gas plant near Linnton, Oregon. That said I. M. Andrus mentioned in plaintiff's seventh cause of action, claimed he contracted typhoid fever by reason of

drinking certain contaminated water furnished him by the plaintiff. That this defendant alleges that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy mentioned in plaintiff's seventh cause of action. That said policy does not cover typhoid fever contracted through the drinking of water furnished by the plaintiff. That under said policy of insurance this plaintiff is not entitled to any reimbursement or indemnity by reason of any expense or loss suffered by the plaintiff, because of the acts or actions of said I. M. Andrus.

Wherefore, defendant having fully answered plaintiff's seventh cause of action, and having fully answered plaintiff's complaint, prays that same be dismissed and that plaintiff take nothing by reason thereof, and that defendant be awarded its costs and disbursements herein.

SENN, EKWALL AND RECKEN,
Attorneys for Defendant.

State of Oregon, County of Multnomah.

I, W. E. Pearson, being first duly sworn, depose and say that I am one of the Managing Agents of the defendant in the above entitled action; and that the foregoing Answer is true as I verily believe.

W. E. PEARSON,

Subscribed and sworn to before me this 12th day of July, 1915.

(Seal)

LOUIS A. RECKEN,
Notary Public for the State of Oregon.

State of Oregon, County of Multnomah, ss.

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 12th day of July, 1915.

H. W. STRONG,

One of the Attorneys for Plaintiff.

Filed July 12, 1915.

G. H. MARSH, Clerk.

And Afterwards, to wit, on the 4th day of August, 1915, there was duly filed in said court, and cause, a Reply, in words and figures as follows, to wit:

REPLY.

Comes now the plaintiff and for its reply to defendant's answer filed herein denies each and every allegation contained in said answer and the whole thereof that is inconsistent with the allegations of the complaint.

Wherefore plaintiff demands judgment as prayed for in the complaint.

JOHN A. LAING, H. W. STRONG

AND JOHN F. LOGAN,

Attorneys for Plaintiff,

1208 Spalding Building, Portland, Oregon.

State of Oregon, County of Multnomah, ss.

I, Geo. F. Nevins, being first duly sworn, depose and say:

That I am Secretary of Portland Gas & Coke Company, a corporation, plaintiff in the foregoing action; that I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

GEO. F. NEVINS,

Subscribed and sworn to before me this 4th day of August, 1915.

H. E. MANGHUM,

(Seal) Notary Public for Oregon.

My commission expires June 1st, 1915.

Due service of the foregoing reply by certified copy thereof is hereby admitted at Portland, Ore., this 4th day of August, 1915.

F. S. SENN,

Attorney for Defendant.

Filed August 4, 1915.

G. H. MARSH, Clerk.

And Afterwards, to wit, on the 4th day of August, 1915, there was duly filed in said court, and cause, a Stipulation to try cause without the intervention of a jury, in words and figures as follows, to wit:

STIPULATION WAIVING JURY.

It is hereby stipulated and agreed, by and between the above entitled parties, through their respective attorneys, that the above case and cause may be tried before the court without a jury and

that the right of trial by jury is hereby expressly waived.

JOHN A. LAING AND H. W. STRONG,
Attorneys for Plaintiff.

F. S. SENN,
Of Attorneys for Defendant.

Filed August 4, 1915.

G. H. MARSH, Clerk.

And Afterwards, to wit, on the 10th day of August, 1915, there was duly filed in said court, and cause, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on duly and regularly for trial in open court upon the issues raised by the pleadings herein before the court without a jury, a jury having been expressly waived by written stipulation and consent of the parties duly filed in this cause, the plaintiff appeared and was represented in court by John A. Laing and H. W. Strong, its attorneys, and the defendant by Senn, Ekwall & Recken, its attorneys; whereupon the court duly heard the testimony of certain witnesses and heard the evidence presented by the plaintiff, the defendant producing no witnesses or evidence, and the court being fully advised in the premises, now

makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

The court finds generally for the plaintiff and against the defendant upon each of the seven causes of action set out in plaintiff's complaint.

CONCLUSIONS OF LAW.

The court concludes that plaintiff is entitled to judgment against the defendant upon the first cause of action for the sum of \$1680.88 with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30, with interest thereon at 6% per annum from August 31st, 1914; upon the third cause of action for the sum of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd,

1915; and for its costs and disbursements incurred herein taxed at the sum of \$.; and that execution issue therefor.

Dated at Portland, Oregon, August 10th, 1915.

R. S. BEAN, Judge.

Filed August 10, 1915.

G. H. MARSH, Clerk.

And Afterwards, to wit, on Tuesday, the 10th day of August, 1915, the same being the 32nd Judicial day of the regular July term of said court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

This cause coming on regularly for trial before the court without a jury, a jury having been expressly waived by the parties hereto by written stipulation duly filed with the clerk of this court, the plaintiff appearing by its attorneys John A. Laing and H. W. Strong, and the defendant by its attorneys Senn, Ekwall & Recken, and the court having heard and considered the testimony and evidence herein and having made and filed its findings of fact and conclusions of law herein and being fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that the plaintiff have and recover judgment against the defendant

upon the first cause of action herein for the sum of \$1680.88 with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30 with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the third cause of action for the sum of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for its costs and disbursements incurred herein taxed at the sum of \$.; and that execution issue therefor.

Dated at Portland, Oregon, August 10, 1915.

R. S. BEAN, Judge.

Filed August 10, 1915.

G. H. MARSH, Clerk.

And Afterwards, to wit, on the 17th day of August, 1915, there was duly filed in said court, and cause, a Bill of Exceptions, in words and figures as follows, to wit:

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the day of, 1915, there was duly filed in the District Court of the United States, for the District of Oregon, a Transcript on Removal, containing therein the following complaint in words and figures as follows, to wit:

*In the Circuit Court of the State of Oregon for
the County of Multnomah.*

PORTLAND GAS & COKE COMPANY,

a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for its first cause of action against the defendant, complains and alleges:

I.

That plaintiff is a corporation organized and existing under the laws of the State of Oregon, and from the 20th day of March, 1913, to the first day of January, 1914, was engaged in the construction of a gas plant and works on its property adjoining the Government Moorings, between the

Willamette River and the Linnton Road in Multnomah County, Oregon, and employed a large number of men in such work.

II.

That the defendant is a corporation organized and existing under the laws of Connecticut, is engaged in general life, liability and accident insurance and has complied with the laws of Oregon with reference to foreign insurance companies transacting business within the State of Oregon.

III.

That on or about March 20th, 1913, the defendant, upon the request of the plaintiff and upon the payment by plaintiff to defendant of the premiums required, duly made, executed and delivered to plaintiff policy of insurance numbered "Policy No. E-91221" entitled "Contractors Employer's Liability Policy," by which policy the defendant, in consideration of the premium provided in the policy, promised and agreed to indemnify the plaintiff against loss and or expense arising or resulting from the claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of the said construction work and business conducted by the plaintiff on said premises adjoining the Government Moorings, whether said

injuries are accidentally suffered or alleged to have been suffered at the location or elsewhere, and to defend at its own cost any and all actions brought against the plaintiff to enforce a claim for damages covered by said policy; provided that the plaintiff forthwith forward to the defendant every summons or other process as soon as the same shall have been served upon it; that in said policy it was expressly provided that, subject to all agreements and conditions expressed therein, claims were covered whenever arising on account of accidents or alleged accidents occurring during the time said policy was in force.

IV.

That the term of said policy was for a period of six months, beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and that by agreements duly made and endorsed on said policy the said policy period was extended from time to time to noon of January 1st, 1914, and that said policy was in full force and effect all such time.

V.

That in carrying on said construction work on said premises the plaintiff had water carried from certain sources of water supply in that vicinity for use by the employes of the plaintiff for drinking purposes in said construction work on said

premises; that there was no drinking water on said premises and the carrying and furnishing of drinking water to its employes was an incident in, and a part of, the construction work carried on by said plaintiff on said premises.

VI.

That during a portion of the months of August and September, 1913, and while said policy of insurance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among other an employe by the name of Louis Weich, who was working for the plaintiff as a common laborer, excavating for concrete foundations, being one of the classified descriptions of business covered by said policy of insurance; that while so employed said Weich drank the water furnished him by the plaintiff; that on or about the 16th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that on or about the 15th day of January, 1914, commenced an action against the plaintiff herein, in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that the water furnished him by the plaintiff herein was unwholesome and unfit for drinking purposes, and that the plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water but instead thereof delivered to him unwholesome water which was then and there impregnated with

typhoid germs and wholly unfit for drinking purposes, and that the plaintiff herein well knew, or by the exercise of reasonable precaution should have known, that the water delivered to him was unwholesome and was impregnated with typhoid germs and was unfit for drinking purposes, and that by reason of his drinking such unwholesome water he contracted typhoid fever, without any fault on his part, and then and there was rendered sick and was on the 16th day of September, 1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed for a long period, to-wit: three months, and was made sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish, and his mental system was permanently shattered and he was seriously and permanently injured in that his heart was inflamed and the valves and muscles thereof were wholly and permanently incapacitated from performing their normal functions and the lower limbs of Weich were benumbed and paralyzed and he alleged his damages at the sum of twenty thousand dollars (\$20,000.00) and demanded judgment against plaintiff herein for said sum.

VII.

That plaintiff immediately upon being served with summons and complaint in said action, forwarded to the defendant the summons and copy of complaint and all processes served upon it in said

action, and called upon the defendant to defend such action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of Louis Weich, as it had agreed to do under said policy of insurance, but that the defendant refused to defend said action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally, and that therefor said policy did not cover such claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Weich upon proof of all the allegations of said complaint, that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Louis Weich and against the plaintiff herein in the sum of \$700.00 and his costs and disbursements; that thereafter plaintiff herein settled and compromised said judgment by paying to said Louis Weich in full settlement and compromise of said claim and said judgment the sum of \$600.00 on or about the 30th day of April, 1914; that the expense reasonably incurred by the plaintiff herein in the defense and settlement of said action and the actual loss and expense sustained and paid in money by plaintiff herein arising or resulting from said claim upon the plaintiff, including said sum paid to said Louis Weich,

amounted to the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) and is itemized as follows:

Filing fee, less refund.....	\$ 2.90
Automobile hire	21.38
Attorney's and claim agent's fees	588.00
Reporter's fees	232.90
Witness fees	75.70
Doctor's fees, (expert testimony)	160.00
Sum paid in compromise settle- ment	600.00
	<hr/>
	\$1680.88

That said sums were paid by the plaintiff between the dates of February 1st and April 30th, 1914, and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) together with interest thereon at the rate of six percent per annum from the 30th day of April, 1914, until paid, no part of which has been paid.

VIII.

That plaintiff has complied with all the conditions named in said policy on its part to be performed as conditions precedent to its right to bring this action insofar as said conditions could be complied with by it, in view of defendant's

denial of liability and its refusal to defend said claim or to live up to its obligations under said policy, and that the above claim does not fall within any of the excepted claims mentioned in said policy and is within the limits of liability fixed by said policy and is a claim covered by said policy.

IX.

That the sum of one hundred sixty-eight dollars (\$168.00) is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a second cause of action against the defendant complains and alleges:—

I.

Plaintiff incorporates in this second cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of Joseph Duerst, who was working for the plaintiff as a common laborer at pile-driving, being one of the classified descriptions of business covered by said

policy of insurance, and that while so employed said Duerst drank the water furnished to him by the plaintiff, and that on or about the 30th day of September, 1913, he quit the employ of plaintiff on account of having contracted typhoid fever, and that on the 9th day of April, 1914, commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that between the first day of August, 1913, and the 30th day of September, 1913, he was employed by the plaintiff herein in and about the construction of said gas plant and factory, and that during all of said time, pursuant to his said employment, plaintiff herein undertook to deliver to him unwholesome water for drinking purposes while he was engaged in said work, and that the plaintiff herein in utter disregard to its duty and obligation to furnish him with wholesome water, carelessly and negligently and without due consideration of his health, furnished and delivered to him for drinking water which was then and there impure, unwholesome, impregnated with disease germs and with typhoid fever germs and wholly unfit for drinking purposes and that the plaintiff well knew, or by the exercise of reasonable precaution should have known, that the water so delivered was impure and unwholesome and impregnated with disease germs and with typhoid germs and wholly unfit for drinking purposes; that he used said water so furnished by the plaintiff herein, and by reason of drinking

said water contracted typhoid fever and was thereby rendered sick and ill and was, on the said 30th day of September, 1913, confined to his bed and by reason of said illness and for a period of three months thereafter was sick, ill and incapacitated from said disease and compelled to remain in bed under the care of doctors and nurses and was disabled and his vitality and physical depleted to a considerable extent and that as a result of drinking said water and of contracting said disease he contracted psoriasis, and that his body and face have been as a result of the alleged negligence and carelessness of the plaintiff herein affected, blotched, discolored, disfigured and broken out in inflamed spots and sores and that he has become permanently disabled and unable to perform manual or other labor, to his damage in the sum of twenty thousand (\$20,000.00) dollars, and that he has been compelled to expend one hundred twenty-seven dollars (\$127.00) for hospital bills and seventy-five dollars (\$75.00) for doctor bills and he demanded judgment against the plaintiff herein for said sums.

III.

That the plaintiff herein immediately upon being served with summons and complaint in said action, forwarded to the defendant the summons and copy of complaint and all processes served upon it, in said action and called upon the defendant to defend such action in the name and on behalf of the plain-

tiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of Joseph Duerst as it had agreed to do under said policy of insurance, but that the defendant refused to defend said action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of such action that it filed an answer denying all liability and that after said case was at issue the plaintiff herein settled and compromised said claim and said action by paying to said Joseph Duerst in full settlement and compromise of his said claim the sum of one hundred fifty dollars (\$150.00) on or about the 31st day of August, 1914; that the expense reasonably incurred by the plaintiff herein in the defense and settlement and compromise of said action and the loss and expense sustained and paid in money by the plaintiff herein arising or resulting from said claim upon it, including said sum paid to Joseph Duerst amounted to the sum of two hundred sixty-two dollars and thirty cents (\$262.30) and is itemized as follows:

Settlement and compromise with	
Duerst	\$150.00
Clerk's fees, less refund.....	.95
Doctor's fees in examination.....	15.00
Attorney's and claim agent's fees.	96.35
<hr/>	
\$262.30	

That said sums were paid between the dates of April 1st and August 31st, 1914, and that there is now due and owing to the plaintiff from the defendant said sum of two hundred sixty-two dollars and thirty cents (\$262.30) together with interest thereon at the rate of six percent per annum from the 31st day of August, 1914, no part of which has been paid.

IV.

That the sum of twenty-six dollars, \$26.00, is a reasonable sum for the court to allow as attorney's fees on this cause of action.

Plaintiff for a third cause of action against the defendant's complains and alleges:—

I.

Plaintiff incorporates in this third cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during the months of July and August, and the first part of September, 1913, while said policy of insurance was in full force and effect the plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of C. Hastings, who was working for the

plaintiff as a common *labor* as stock and time-keeper, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Hastings drank the water furnished him by the plaintiff, and that on or about the 10th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein, in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Hastings that the water furnished him for drinking purposes by the plaintiff herein was impure, and unwholesome and impregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 10th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish, and that his system was permanently

shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff, unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Hastings, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Hastings, but that the defendant denied all liability for said claim and refused to *having* anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred fifty dollars (\$150.00), which sum was paid unto said Hastings on or about the first day of September, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of fifty dollars (\$50.00) in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said

claim said sum of two hundred dollars, together with interest thereon at the rate of six per cent per annum from December 1st, 1914.

IV.

That the sum of twenty dollars is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a fourth cause of action against the defendant complains and alleges:—

I.

Plaintiff incorporates in this fourth cause of action by reference thereto and makes a part hereof, paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of Otto Bush, who was working for the plaintiff as a carpenter, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Bush drank the water furnished him by the plaintiff and that on

or about the 8th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Bush that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 8th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim made upon it by said Bush, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Bush, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred dollars, which sum was paid unto said Bush on or about the first day of April, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of twenty-five dollars (\$25.00) in addition to said sum of one hundred dollars and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of one hundred twenty-five dollars together with interest thereon at the rate of six per cent. per annum from April 1st, 1914.

IV.

That the sum of twelve dollars and fifty cents

is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a fifth cause of action against the defendant, complains and alleges:—

I.

Plaintiff incorporates in this fifth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of George Harbick, who was working for the plaintiff as a common laborer in the insulation of electrical equipment, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Harbick drank the water furnished him by the plaintiff and that on or about the 11th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein

and it was claimed by said Harbick that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff herein knew or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Harbick and called upon the defendant to indemnify the plaintiff against said claim and all loss

and expense arising or resulting or that might arise or result from said claim of said Harbick, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred twenty-five dollars, which sum was paid unto said Harbick on or about the first day of March, 1914, in full settlement of said claim, that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars (\$25) in addition to said sum of one hundred twenty-five dollars and that there is now due and owing to the plaintiff from defendant on account of said claim the sum of one hundred and fifty dollars together with interest thereon at the rate of six per cent. per annum from March 1st, 1914.

IV.

That the sum of fifteen dollars is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a sixth cause of action against the defendant complains and alleges:—

I.

Plaintiff incorporates in his sixth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of F. Kohl, who was working for the plaintiff as a common laborer engaged in road making, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Kohl drank the water furnished him by the plaintiff, and that on or about the 11th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Kohl that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and im-

pregnated with typhoid germs and wholly unfit for drinking purposes, and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff; that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain suffering and mental anguish and that his sytem was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Kohl, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Kohl, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to

avoid litigation settled and compromised said claim for the sum of one hundred fifty dollars, which sum was paid unto said Kohl on or about the 1st day of March, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said claim, the sum of one hundred seventy-five dollars, together with interest thereon at the rate of six per cent. per annum from March 1st, 1915.

IV.

That the sum of seventeen dollars and fifty cents is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a seventh cause of action against the defendant complains and alleges:—

I.

Plaintiff incorporates in this seventh cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of I. M. Andrus, who was working for the plaintiff as a millwright in erecting the machinery for the briquetting plant, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed as such millwright said I. M. Andrus drank the water furnished him by the plaintiff and that on or about the 7th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever and that on or about the 13th day of February, 1914, he commenced an action against the plaintiff herein, in the Circuit Court of the State of Oregon for Multnomah County, in which he alleged that the water furnished him by the plaintiff herein was unwholesome and unfit for drinking purposes and that the plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water but instead thereof delivered to him unwholesome and impure water which was then and there impregnated with typhoid germs and wholly unfit for drinking purposes and that the plaintiff herein knew, or by the exercise of reasonable care and caution should have known that the water delivered to him was unwholesome and was impregnated with

typhoid germs and was unfit for drinking purposes; that by reason of his drinking such unwholesome water he contracted typhoid fever without any fault on his part and was then and there rendered sick and was on the said 11th day of September, 1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed and in the hospital for eleven and one-half weeks and that by reason of and as a direct and proximate result of said careless and negligent act on the part of the plaintiff herein in furnishing said impure and unwholesome water he suffered great pain and mental anguish, suffered from *deliriu*, high fever and unconsciousness and that his brain, spinal cord, nerves and nervous system generally were poisoned and inflamed; that he suffered paralysis of certain muscles of his arms and legs and that he had toe drop in his left foot and an incomplete wrist drop in his right hand and was numb to pin prick over part of the back of his right hand and forearm and over the front of his left leg and ankle and that he was permanently injured and incapacitated from performing any work whatsoever; that he alleged his damages at the sum of twenty-five thousand dollars, with three hundred forty-seven dollars special damages for hospital and doctor fees and demanded judgment against the plaintiff herein for said sum.

III.

That plaintiff immediately upon being served with summons and complaint in said action for-

warded to the defendant a copy of said summons and complaint and all processes served upon it in said action, and called upon the defendant to defend said action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of I. M. Andrus, as it had agreed to do under said policy of insurance; but that the defendant refused to defend such action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Andrus upon proof of all the allegations of said complaint; that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Andrus and against the plaintiff herein in the sum of fifty-five hundred dollars and his costs and disbursements taxed at sixty-four dollars and ninety-five cents that thereafter plaintiff herein appealed said case to the Supreme Court of the State of Oregon and while said appeal was pending a compromise settlement was made and effected between the plaintiff herein and said I. M. Andrus in which said judgment and claim of said Andrus against the plaintiff herein was compromised and settled for the sum of sixteen hundred thirty-five dollars on or about the 22nd day of

March, 1915; that the expense reasonably incurred by the plaintiff herein in the defense of said action and in appeal to the Supreme Court and in the settlement thereof and the actual loss and expense sustained and paid in money by the plaintiff herein arising and resulting from said claim upon the plaintiff herein by said I. M. Andrus amounted to the sum of twenty-seven hundred eighty-five dollars and ninety-four cents and is itemized as follows:

Fees in Circuit Court	\$ 9.15
Witness fees and expert testimony	90.00
Reporter's fees	150.00
Automobile expense	1.75
Appeal bond	27.50
Filing fee in Supreme Court and copy of transcript	28.48
Printed abstract and briefs in Su- preme Court	82.16
Attorney's and Claim Agent's fees	761.20
Amount paid in compromise settle- ment	1635.00
	<hr/>
	\$2785.94

That said sums were paid by the plaintiff herein between the dates of February 13th, 1913, and March 22nd, 1915, and that there is now due and owing to the plaintiff herein from the defendant on account of said claim said sum of twenty-seven hundred eighty-five dollars and ninety-four cents, together with interest thereon at the rate of six per cent. per annum

from the 22nd day of March, 1915, until paid, no part of which has been paid.

IV.

That the sum of two hundred seventy-eight dollars and sixty cents is a reasonable sum for the court to allow as attorney's fees in this seventh cause of action.

WHEREFORE, plaintiff demands judgment against the defendant herein on its first cause of action for the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) with interest thereon at the rate of six per cent. per annum from April 30th, 1914, together with the sum of one hundred sixty-eight dollars (\$168.00) attorney's fees; for the sum of two hundred sixty-two dollars and thirty cents (\$262.30) with interest thereon at the rate of six per cent. per annum from the 31st day of August, 1914, together with the sum of twenty-six dollars (\$26.00) attorney's fees in the second cause of action; for the sum of two hundred dollars (\$200.00) with interest thereon at the rate of six per cent. per annum from December 1st, 1914, together with the sum of twenty dollars (\$20.00) attorney's fees, in the third cause of action; for the sum of one hundred twenty-five (\$125.00) with interest thereon at the rate of six per cent. per annum from April 1st, 1914, together with the sum of twelve dollars and fifty cents (\$12.50) attorney's fees in the fourth cause of action; for the sum of one hundred fifty dollars

(\$150.00) with interest thereon at the rate of six per cent. per annum from March 1st, 1914, together with the sum of fifteen dollars (\$15.00) attorney's fees in the fifth cause of action; for the sum of one hundred seventy-five dollars (\$175.00) with interest thereon at the rate of six per cent. per annum from March 1st, 1914, together with seventeen dollars and fifty cents attorney's fees in the sixth cause of action and for the sum of twenty-seven hundred eighty-five dollars and ninety-four cents (\$2785.94) with interest thereon at the rate of six per cent. per annum from March 22nd, 1915, together with two hundred seventy-eight dollars and sixty cents attorney's fees in the seventh cause of action and for plaintiff's costs and disbursement incurred herein.

JOHN A. LAING,
JOHN F. LOGAN,
H. W. STRONG,
Attorneys for Plaintiff.

That afterwards this defendant filed a demurrer to said complaint of the plaintiff, said demurrer being in words and figures as follows, to-wit:—

*In the District Court of the United States for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,
a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,
a corporation,

Defendant,

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

SENN-EKWALL & RECKEN,
Attorneys for Defendant.

I, F. S. Senn, one of the attorneys for the defendant hereby certify that the foregoing demurrer is made in good faith, and is not made for the purpose of hindering or delaying the trial of the above entitled action, and I believe that the point raised by said demurrer is well taken.

F. S. SENN,

That afterwards on to-wit, the 21st day of June, 1915, the court made an order overruling said demurrer, said order being as follows, to-wit:—

*In the District Court of the United States for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,

a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a corporation,

Defendant,

Portland, Oregon, Monday, June 21st, 1915.

R. S. BEAN, D. J., (ORAL)

The case of the Portland Gas and Coke Company vs. the Aetna Life Insurance Company is an action on an indemnity policy by which the Company agreed to indemnify the plaintiff against loss and (or) expense arising or resulting from claim upon the assured for damages on account of bodily injuries and (or) death accidentally suffered by an employe.

Certain employes of the plaintiff company contracted typhoid fever from water furnished for their use by the plaintiff. They brought actions against the plaintiff company and recovered damages on account thereof, and the question for decision in this case is whether that constitutes a bodily injury acci-

dentally received or suffered within the meaning of this policy.

It will be observed that the language of this policy is exceedingly broad. It differs from many indemnity policies in that liability is not limited to injuries received from external violence nor to accidents which result in producing visible external marks or injuries, or evidence of violence, but it is a broad indemnity against injuries resulting from accidental causes.

Now, the English Workman's Compensation Act of 1897 provided for compensation to workmen for personal injury by accident arising in the course of their employment. While a workman was engaged in sorting wool a bacillus passed from the wool to his eye afflicting him with anthrax from which he died. On appeal to the Privy Council, it was held that the injury was due to an accident within the meaning of this law, because first it was an accident that the bacillus happened to be in the wool; second, it was an accident that it settled on the workman in a delicate or tender spot, and third, it was an accident that the poison found its way into the workman's system and caused his death. And therefore the court held that the case came within the Compensation Act. On the same reasoning it could be properly held in this case that the injury here was an accident because it was an accident that the typhoid germs happened to be in the water furnished the plaintiff's employees,

and second, it was an accident that the germ found favorable opportunity for development in the workmen.

A similar ruling was announced by the Supreme Court of Massachusetts in *Hood vs. Maryland Casualty Company*, 206 Mass. The policy in that case provided indemnity against loss from liability for damages on account of bodily injuries accidentally suffered, similar to the policy under consideration. The employe was a hostler and in the course of his employment he contracted glanders, through negligence of his employer. The court held the insurance company liable because the infection which caused the disease was due to accident.

So also in the case of the *Columbia Paper Company vs. the Fidelity & Casualty Company*, 104 Mo. Ap., a policy similar to the one now in controversy. The employe contracted a kidney disease by handling infected wool rags, and the court held it was within the terms of the policy, and the insurance company liable.

It is sought to distinguish these cases from the one at bar because it is claimed that in the cases referred to there was an abrasion of the body through which the poison entered the system, but, as stated in the English cases, that fact is immaterial because it was a mere fortuitous accident that it came in contact with this particular spot, and where some affliction of our physical frame is in

any way induced by accident, we should be on our guard that we are not misled by medical phrases to allow the proper application of the phrase accident causing the injury, because the injury inflicted by the accident sets up a condition of things which medical men denominate disease.

Under these circumstances, and they seem to be directly in point, I conclude that the injuries referred to in the complaint come within the terms and provisions of this policy, and the demurrer should be overruled."

That this defendant through its attorney objected to the ruling of the court in over-ruling said demurrer and an exception was duly allowed this defendant.

Exception No. 2.

That on, to-wit, the 4th day of August, 1915, this cause came on for trial before the Hon. R. S. Bean, District Judge, and the following proceedings were had and the following testimony was introduced by the plaintiff.

*In the District Court of the United Statse for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,
Plaintiff.

vs.

AETNA LIFE INSURANCE COMPANY,
Defendant.

Portland, Oregon, August 4, 1915, 2 P. M.

John A. Laing, and H. W. Strong, for Plaintiffs.

F. S. Senn, for defense.

R. S. Bean, District Judge.

C. W. Platt,

John A. Laing.

Mr. LAING: We would like to stipulate that this case shall be tried without a jury—before the court.

COURT: There is a federal statute covering that matter and it will be necessary for you to file a written stipulation.

Mr. LAING: Very well, we will file a written stipulation. It is also agreed that this contract with the riders attached represent this contract of insurance that is sued upon here, and we desire to offer it in evidence as Plaintiff's Exhibit A.

Insurance Contract marked Plaintiff's Exhibit A.

Mr. LAING: It is stipulated also that the sums actually paid to the men who claim damages against the Portland Gas and Coke Company as set forth in causes of action 1 to 7 inclusive, were paid in reasonable settlement of those claims and that the defendant waives any question as to the amount of those settlements, or the provision in the policy forbidding our making settlement without their consent, in view of the fact that they had previously denied liability under the contract or policy.

C. W. PLATT, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of C. W. Platt.)

Direct Examination.

(Questions by Mr. LAING.)

Mr. Platt, you are the Assistant Treasurer of the Portland Gas and Coke Company, the plaintiff in this case?

A. I am.

Q. In such capacity you have active charge of the accounting department of that company, and charge of the matter of disbursing moneys for various purposes?

A. I have.

Q. These disbursements are made under your active supervision? and within your knowledge, are they not?

A. They are.

Q. This action, Mr. Platt, relates to various sums expended by the Portland Gas and Coke Company in defending various claims against it by its employes, and an attempt is being made to recover the amounts so expended from the Aetna Life Insurance Company. The first cause of action deals with the expense of a claim of Louis Weich against the Gas Company. I would like to ask you if you have with you a statement of the moneys expended by the Gas Company in disposing of that claim?

A. I have.

Q. Will you kindly state the amounts expended and the purposes for which they were expended in connection with the defense of that claim?

(Testimony of C. W. Platt.)

A. The total sum of \$1680.88: Filing fees, less refund that was made, \$2.90.

Q. That is filing fees where?

A. Filing fees with the Circuit Court.

Q. That is the defendant's filing fees in that action?

A. Yes sir. Automobile hire. That was in connection with getting sufficient testimony to defend the suit, \$21.38. Attorneys and claim agents fees, \$588.00. Fees to reporters in the court \$232.90. Witness fees \$75.70. Expert testimony on the part of physicians \$160.00. And the sum of \$600.00 in settlement of the claim to the plaintiff.

Q. These sums, amounting to \$1680.88 were all actually expended by the Portland Gas and Coke Company in defending claim of Louis Weich as set forth in the plaintiff's first cause of action in this complaint?

A. Yes sir.

Q. Referring to the plaintiff's second cause of action dealing with the claim of Joseph Duerst, I will ask you if you have a record of the expenditures made by the Gas Company in defending that claim against it.

A. Yes, sir.

Q. Kindly state what those expenses were, and for what purposes they were incurred.

A. We paid for court fees, \$.95; doctor's examination, \$15.00; attorney's and claim agent's fees,

(Testimony of C. W. Platt.)

\$96.35; the sum of \$150 was paid to Mr. Duerst in settlement.

Q. Making the total expenditures—

A. Making total expenditures, \$262.30.

Q. And those items were all expended by the Gas Company in connection with that claim?

A. Yes, sir.

Q. Referring now to plaintiff's third cause of action, dealing with the claim against it of one C. Hastings, I will ask you if you have a statement or if you know the amount that the plaintiff in this action expended in defending the claim of C. Hastings and various items of that expense?

A. I have information on that showing that \$200.00 was expended of which \$150.00 was paid to Mr. Hastings and \$50.00 was paid to the claim agent to settle the claim.

Q. Those expenses were actually incurred by the Portland Gas and Coke Company in defending that claim?

A. Yes, sir.

Q. Referring now to the claim of Otto Bush against the Portland Gas and Coke Company, plaintiff's fourth cause of action, do you know how much money was expended by the Gas Company in defense of that claim, and for what purposes it was spent?

A. We paid Mr. Bush \$100.00 and the claim agent's expenses in settlement was \$25, making \$125.00.

(Testimony of C. W. Platt.)

Q. That sum was actually expended by the Gas Company in defending that claim?

A. Yes, sir.

Q. Referring now to the plaintiff's fifth cause of action, dealing with the claim of George Harbick against the Gas Company, do you know the amount expended by the plaintiff in this action in defense of the Harbick claim?

A. Yes, sir.

Q. Kindly state that.

A. \$150, of which Mr. Harbick received \$125.00, and the claim agent's charge for settling it was \$25.00.

Q. And that sum was expended by the Portland Gas and Coke Company?

A. Yes, sir.

Q. In settling that claim. Referring now to plaintiff's sixth cause of action dealing with claim against it of F. Kohl, have you a similar statement of moneys, if any, expended by the Portland Gas and Coke Company in defense of that claim?

A. We paid Mr. Kohl \$150, and the claim agent's charge was \$25, making a total of \$175 paid on that claim.

Q. Referring now to plaintiff's seventh cause of action, dealing with the claim against it of one I. M. Andrus, can you state what expenditures were incurred by the Portland Gas and Coke Company in defending that claim?

A. The expenses were as follows: Court fees

(Testimony of C. W. Platt.)

for filing \$9.15. Witness fees, \$90.00. Court reporter's fees, \$150.70. Auto hire, \$1.75. Appeal bond, \$27.50. Supreme Court fee, \$28.48. Printing expense for brief, \$82.16. Attorneys' and claim agent's fees, \$761.20. Amount paid in compromise settlement, \$1635, making a total of \$2785.94, all of which was paid by the Gas Company.

Q. In connection with the item of attorney's fees, shown in these various causes of action, I wish you would state just how the charges for attorney's services are rendered to the Gas Company, and how they are paid.

A. The attorneys who handle these matters for the Gas Company are in the employ of the Pacific Power and Light Company, and the time that they spend on matters for the Portland Gas and Coke Company is charged to them monthly on the basis of the services rendered, and these bills have been paid by the Gas Company to the Pacific Power and Light Company.

Q. Is that on the basis of the service rendered, or on the basis of the time spent on any particular matter?

A. Well, it is on the *basis* of the service rendered.

Q. The item of the attorney's fees in the Andrus fees amounted to \$761.20. Was all of that paid to the attorneys for the Pacific Power and Light?

A. I beg your pardon, Mr. Laing.

Q. I say was that item of \$761.20 in the I. M.

(Testimony of John A. Laing.)

Andrus claim was that all paid the *for the* Pacific Power and Light Company?

A. In that sum there was \$200.00 paid to John F. Logan who worked with the Pacific Power and Light Company's attorneys on the case.

Q. In other words, he was employed in addition to the attorneys who had previously handled the other cases. He was employed independently in that case, was he not?

A. Yes, sir.

Q. And he was paid \$200 for his services?

A. Yes, sir.

No Cross Examination. Witness Excused.

JOHN A. LAING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination (without questioning).

I would just like to explain briefly the item of attorney's expenses in those various claims, for the reason that on their face they may appear to be somewhat large in proportion to the settlements actually made. I am employed by the Pacific Power and Light Company, as its attorney, and that Company is, to a certain extend, *affiliated* with the Portland Gas and Coke Company, having some of the same operating officials. The Pacific Power and Light Company pay the expenses of my department, including my salary, that of Mr. Strong,

(Testimony of John A. Laing.)

and our two stenographers. Whatever work we do each day during the month a record is kept of it, and at the end of the month a charge is made to each company, or to each job that we do during the month. On the basis of the actual time and pro rate of the salary involved in that work. So that in those *charge* for attorney's services shown in these various causes of action, the charges for attorney's fees in each instance represent the actual time of my department, including my services, Mr. Strong's and the two stenographers, spent on these particular cases, apportioned on the basis of the salaries paid to us during that period. In the case of Louis Weich, the first cause of action, a substantial charge is shown there for attorney's fees, which may be explained by reference to the record of the trial of that case. The case was the forerunner of a number of suits that were filed in varying amount demanded from twenty to twenty-five thousand dollars, and it therefore was important that the circumstances and the law surrounding the question of liability be thoroughly investigated, and a great deal of the time spent on the Weich case worked to the company's advantage in connection with the other cases which were tried later, or which were brought later. The case was tried before Judge Gatens and a jury in March, 1914, and required five days to try it. Later, motion was made for a new trial, in connection with which a brief was prepared, and there were several arguments and hear-

(Testimony of John A. Laing.)

ings before Judge Gatens, in connection with that, all of which took a great deal of time. In the meantime we were obliged to prepare a bill of exceptions, preparatory to appealing the case to the Supreme Court, and we practically spent as much time on the case as if we had perfected our appeal to the Supreme Court. The charges given in Mr. Platt's testimony represent only the actual time spent by us in connection with that case. In connection with the case of I. M. Andrus, which is set forth in plaintiff's seventh cause of action, the litigation in that case was very active from the time the complaint was filed in February, 1914, until the time the case was settled in March, 1915. The case was tried before a jury, taking three days in court for both Mr. Strong and myself. A motion was made for a new trial, that was supplemented by two amended motions for a new trial. A very complete brief was prepared and filed on the motion for a new trial, and later on appeal was taken to the Supreme Court, and an extensive brief prepared, and filed in connection with that appeal. A brief was also prepared in answer to a counter appeal which was made by the plaintiff in that case so that a great deal of the time of the Legal Department was occupied in connection with that case for a period of about a year. The time that was so spent is all that is represented in these charges shown in Mr. Platt's testimony, except that we employed Mr. John F. Logan to assist in arguing the motion for

(Testimony of John A. Laing.)

a new trial and to assist in the preparation of the brief to the Supreme Court, for which we paid him \$200. I think that is all.

Mr. STRONG: Do you want to cover the reasonableness of the charges?

Mr. SENN: We don't question the reasonableness of the charge.

Witness excused.

Mr. LAING: I would like to stipulate and have the record show also that while the plaintiff in this case requests an allowance for attorney's fees, in this particular case we waive that request in respect to each cause of action, and do not ask for any attorney's fees, in prosecuting this particular case. All that we ask is that the Gas Company be recompensed for the amount it actually paid for attorney's in defending these seven causes of action.

Plaintiff rests. No defense.

Mr. SENN: The legal matters were submitted to your Honor on demurrer, and I presume there will be no change.

COURT: The plaintiff may take judgment in accordance with the proof.

That the defendant by its attorney objected to the judgment of the court, *an* an exception was duly allowed the defendant.

Exception No. 3.

That afterwards, on to-wit the 10th day of August, 1915, said Court made the following Findings of Fact and Conclusion of Law:

*In the District Court of the United States for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,
a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,
a corporation,

Defendant.

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW.**

This cause came on duly and regularly for trial in open court upon the issues raised by the pleadings herein before the court without a jury having been expressly waived by written stipulation and consent of the parties duly filed in this cause; the plaintiff appeared and was represented in court by John A. Laing and H. W. Strong, its attorneys, and the defendant by Senn, Ekwall & Recken, its attorneys; whereupon the court duly heard the testimony of certain witnesses and heard the evidence presented by the plaintiff, the defendant producing no witnesses or evidence, and the court being fully advised in the premises now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

The Court find generally for the plaintiff and against the defendant upon each of the seven causes of action set out in plaintiff's complaint.

CONCLUSIONS OF LAW.

The court concludes that plaintiff is entitled to judgment against the defendant upon the first cause of action for the sum of \$1680.88, with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30 with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the third cause of action for the sum of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for its costs and disbursements incurred herein taxed at the sum of \$. and that execution issue therefor.

Dated at Portland, Oregon, August 10th, 1915.

R. S. BEAN,
Judge."

That this defendant by its counsel objected to the foregoing Findings and Conclusions of said Court, said objection being overruled and an exception was duly allowed this defendant.

Exception No. 4.

That on to-wit the 10th day of August, 1915, this court rendered the following judgment against the defendant, said judgment, *ommitting* the title and venue, being as follows:

“This cause coming on regularly for trial before the court without a jury, a jury having been expressly waived by the parties hereto by written stipulation duly filed with the clerk of this court, the plaintiff appearing by its attorneys John A. Laing, and H. W. Strong, and the defendant by its attorneys, Senn, Ekwall and Recken, and the court having heard and considered the testimony and evidence herein and having made and filed its Findings of Fact and Conclusions of Law herein and being fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED that the plaintiff have and recover judgment against the defendant upon the first cause of action herein for the sum of \$1680.88 with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30 with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the third cause of action for the sum

of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for its costs and disbursements incurred herein taxed at the sum of \$. and that execution issue therefor.

Dated at Portland, Oregon, August 10th, 1915.

R. S. BEAN.

Judge.”

That this defendant by its counsel objected to the rendering of said judgment, said objection being by the Court overruled and an exception allowed this defendant.

Exception No. 5

That on to-wit the 10th day of August, 1915, this defendant presented to the Court, for allowance, the following proposed Finding of Fact, upon the First Cause of Action, in plaintiff's complaint.

I.

“That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered for a valuable consideration, a policy of insurance being numbered E-91221 and entitled “Contractor’s Employer’s Liability Policy” and which policy was introduced in evidence, and made a part thereof and is marked Plaintiff’s Exhibit “A.”

. IV.

That said policy among other things provides that the defendant shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily

injuries accidentally suffered or alleged to have been suffered by an employee or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work, plaintiff supplied to one Louis Weich water for drinking purposes during the months of August and September, 1913, and while the aforesaid policy was in full force and effect. That said Louis Weich by reason of drinking said water so furnished by plaintiff contracted typhoid fever and afterwards, to-wit:

On the 15th day of January, 1914, said Louis Weich brought action against the plaintiff in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that the water

furnished him by the plaintiff was unwholesome and unfit for drinking purposes and that the plaintiff was careless and negligent in furnishing him such unwholesome drinking water and that by reason of said action this plaintiff was required to incur expense in defending said action, as follows, to-wit:

Filing fees, less refund.....	\$ 2.90
Automobile hire	21.38
Attorney's and Claim Agent's fees	588.00
Reporter's fees	232.90
Witness fees	75.00
Doctor's fees (expert testimony)	160.00
Sum paid in compromise settlement	600.00
	<hr/>
	\$1680.88

That said sum was paid by the plaintiff and is a reasonable disbursement in said action of Louis Weich being the first cause of action set forth in plaintiff's complaint.

VII.

That said sum of \$1680.88 was paid by this plaintiff on the 30th day of April, 1914. That the injuries suffered by the said Louis Weich resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally

suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception was allowed the defendant, to the refusal of the court to allow said Finding of Fact, upon plaintiff's first cause of action.

Exception No. 6.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance, the following proposed Finding of Fact, upon the Second cause of action, in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in gen-

eral life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy," and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of Sep-

tember, 1913, at noon and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one Joseph Duerst, an employe of plaintiff water to drink; that said Joseph Duerst claims that he contracted typhoid fever from drinking said water and on the 9th day of April, 1914, said Joseph Duerst commenced an action in the Circuit Court of the State of Oregon for Multnomah County, claiming that this plaintiff had been negligent in supplying him unwholesome and unfit drinking water, that said plaintiff was compelled to contest and defend said action at its own expense, defendant having declined to defend said action as provided by the policy; that this plaintiff in defending said action and in compromising the same was required to make the following expenditures:

Settlement and compromise with	
Joseph Duerst	\$150.00
Clerk's fees, less refund.....	.95
Doctor's fees in examination.....	15.00
Attorney's and claim agent's fees..	96.35
<hr/>	
\$262.30	

That said sum of \$262.30 was paid by the plaintiff and is a reasonable disbursement in said claim

of said Joseph Duerst being the plaintiff's second cause of action herein.

VII.

That said sum of \$262.30 was paid by this plaintiff on the 31st day of August, 1914. That the injuries suffered by the said Joseph Duerst resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception was allowed the defendant to the refusal of the court to allow said Finding of Fact, upon plaintiff's second cause of action.

Exception No. 7.

That on to-wit the 10th day of August, 1915, the defendant presented to the court for allowance the following proposed Finding of Fact, upon the third cause of action in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State

of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy," and which policy was introduced in evidence and made a part hereof and is marked plaintiff's exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employes of the plaintiff by reason of plaintiff's construc-

tion work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of September, 1913, at noon and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one C. Hastings drinking water, during the months of July, August and September in the year of 1913; that said C. Hastings alleged that he contracted typhoid fever from drinking said water; that said water was unwholesome and unfit and that plaintiff was negligent in furnishing the same to said C. Hastings; that said C. Hastings made claim against this plaintiff for damages by reason of injuries suffered in contracting said typhoid fever from drinking said water and threatened to bring action against plaintiff unless settlement was made; that plaintiff incurred *an* paid in disposing of said claim of said C. Hastings the following sum:

Paid in settlement to said C. Hastings	\$150.00
Attorney's fees	50.00
	<hr/>
	\$200.00

That said sum of \$200.00 is a reasonable disbursement in said claim of said C. Hastings and was paid by this plaintiff; that defendant denied liability under its policy of insurance on the ground that typhoid fever was not covered under said policy and was not a bodily injury accidentally suffered.

VII.

That said sum of \$200.00 was paid by this plaintiff on the 1st day of December, 1914; that the injuries suffered by the said C. Hastings resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Findings of Fact, and an exception was allowed the defendant, to the refusal of the court to allow said Findings of Fact, upon plaintiff's third cause of action.

Exception No. 8.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance, the following proposed Finding of Fact, upon the fourth cause of action, in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life liability and accident insurance, in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered E-01221 and entitled "Contractor Employer's Liability Policy," and which policy was introduced in evidence and made a part hereof and is marked plaintiff's exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the terms of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VII.

That in carrying on said construction work plaintiff supplied to one Otto Bush drinking water; that said Otto Bush claims that said water was contaminated, unwholesome and unfit and that as a result of drinking said water he contracted typhoid fever; that the defendant company claimed and contended

that typhoid fever was not a bodily injury accidentally suffered and declined to defend against said claim; that said Otto Bush threatened suit against this plaintiff by reason of said illness. Whereupon this plaintiff paid in disposing of said claim of said Otto Bush, the following sums:

Settlement and compromise of	
claim of said Otto Bush.....	\$100.00
Attorney's fees	25.00
	<hr/>
	\$125.00

That said sum of \$125.00 is a reasonable disbursement of said claim of Otto Bush and was paid by plaintiff.

VII.

That said sum of \$125.00 was paid by this plaintiff on the 1st day of April, 1914; that the injuries suffered by the said Otto Bush resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception was allowed the defendant, to the refusal of the court to allow said Finding of Fact, upon plaintiff's fourth cause of action.

Exception No. 9.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance, the following proposed Finding of Fact, upon the fifth cause of action, in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy," and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of September, 1913 at noon and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one George Harbick drinking water, which said George Harbick claims was contaminated, unwholesome and unfit and from which he claims he contracted typhoid fever and claimed that plaintiff had been negligent and careless in furnishing him said drinking water and threatened to

bring suit against this plaintiff by reason of said negligence; whereupon plaintiff was required to and did in disposing of said claim make the following payments:—

Paid in settlement to said George	
Harbick	\$125.00
Attorney's fees	25.00
<hr/>	
	\$150.00

That said sum was paid by the plaintiff and is a reasonable disbursement; that the defendant denied liability under its policy on the ground that said policy did not cover injuries resulting from typhoid fever and that typhoid fever is not a bodily injury accidentally suffered.

VII.

That said sum of \$150.00 was paid by this plaintiff on *the* March 1st, 1914, that the injuries suffered by the said George Harbick resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception

was allowed the defendant, to the refusal of the court to allow said Finding of Fact, upon plaintiff's fifth cause of action.

Exception No. 10.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance, the following proposed Finding of Fact, upon the sixth cause of action, in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered

E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof, and is marked plaintiff's exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon and ending on the 20th day of September, 1913, at noon and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff furnished drinking water to one F. Kohl; that

said F. Kohl claimed said water was unwholesome, unfit and contaminated with typhoid germs and as a result of drinking said water, said F. Kohl claims he contracted typhoid fever and alleged that plaintiff was careless and negligent in furnishing him said unwholesome and unfit water, and threatened suit against this plaintiff; that in disposing of said claim of said F. Kohl plaintiff made the following payments:

Paid F. Kohl in settlement.....	\$150.00
Attorney's fees	25.00
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	\$175.00

That said sum was paid by the plaintiff and is a reasonable disbursement in said claim of F. Kohl; that defendant denied liability under its policy contending that typhoid fever was not a bodily injury accidentally suffered and refused to accept or pay said disbursement.

VII.

That said sum of \$175.00 was paid by this plaintiff on the 1st day of March, 1914; that the injuries suffered by the said F. Kohl resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and

does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception was allowed the defendant, to the refusal of the court to allow said Finding of Fact, upon plaintiff's sixth cause of action.

Exception No. 11.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance, the following proposed Finding of Fact, upon the seventh cause of action, in plaintiff's complaint.

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one I. M. Andrus drinking water during the months of July, August and September; that said I. M. Andrus claims that he contracted typhoid fever from the drinking of such water; that said water was contaminated with typhoid germs and that plaintiff was careless and negligent in furnishing such contaminated water to its employes; that on the 13th day of February, 1914, said I. M. Andrus brought action against the plaintiff in the Circuit Court of Multnomah County, for the State of Oregon and for damages resulting from said illness contracted as he claims from drinking said water; that plaintiff in defending said claim and suit incurred and paid the following sums of money:—

Fees in Circuit Court	\$ 9.15
Witness fees and expert testimony	90.00
Reporter's fees	150.00
Automobile expense	1.75
Appeal bond	27.50
Filing fee in Supreme Court and copy of transcript	28.48
Printed abstract and briefs in Su- preme court	82.16
Attorney's and Claim Agent's fees	761.20
Amount paid in compromise settle- ment	1635.00
	<hr/>
	\$2785.94

That said sum was paid by the plaintiff and is a reasonable disbursement; that defendant denied liability under its policy on the ground that typhoid fever was not a bodily injury accidentally suffered.

That said sum of \$2785.94 was paid by this plaintiff on the 22nd day of March, 1915; that the injuries suffered by the said I. M. Andrus resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.

That the court on said 10th day of August, 1915, disallowed said Finding of Fact, and an exception was allowed the defendant, to the refusal of the court to allow said Finding of Fact, upon plaintiff's seventh cause of action.

Exception No. 12.

That, on to-wit, the 10th day of August, 1915, this defendant presented to the court, for allowance, the following proposed General Finding of Fact upon all of the causes of action set forth in plaintiff's complaint.

“And generally the court finds that said Louis Weich, Joseph Duerst, C. Hastings, Otto Bush, George Harbick, F. Kohl, and I. M. Andrus were

all employes of the plaintiff company during the months of July, August and September, and particularly during the time that said employes contracted said typhoid fever; that the defendant company contended that said policy of insurance did not cover typhoid fever for the reason that typhoid fever was not a bodily injury accidentally suffered and declined to indemnify plaintiff for any disbursement that plaintiff might make; that the damages claimed by said employes were all for typhoid fever resulting from the drinking of water which was furnished said employes by plaintiff during the working hours of said plaintiff.

That the court on the said 10th day of August, 1915, disallowed said General Finding of Fact and an exception was allowed to defendant to the refusal of the court to allow said General Finding of Fact, upon all of the causes of action set forth in plaintiff's complaint.

Exception No. 13.

That on to-wit the 10th day of August, 1915, this defendant presented to the court, for allowance the following proposed Conclusion of law upon the first cause of action, set forth in plaintiff's complaint.

“Based upon the court's findings of fact upon plaintiff's first cause of action, the court concludes that plaintiff is not entitled to recover upon its first cause of action and that the defendant is

entitled to its costs and disbursements upon said first cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed Conclusion of Law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff's first cause of action.

Exception No. 14.

That on to-wit the 10th day of August, 1915, this defendant presented to the court for allowance the following proposed Conclusion of law upon the second cause of action set forth in plaintiff's complaint.

“Based upon the court's findings of fact upon plaintiff's second cause of action the court concludes that plaintiff is not entitled to recover upon its second cause of action and that the defendant is entitled to its costs and disbursements upon said second cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed Conclusion of Law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff's second cause of action.

Exception No. 15.

That on to-wit, the 10th day of August, 1915, this defendant presented to this court, for allowance

the following proposed Conclusion of Law, upon the third cause of action set forth in plaintiff's complaint.

“Based upon the court's findings of fact upon plaintiff's third cause of action, the court concludes that plaintiff is not entitled to recover upon its third cause of action and that defendant is entitled to its costs and disbursements upon said third cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff's third cause of action.

Exception No. 16.

That on to-wit, the 10th day of August, 1915, this defendant presented to the court for allowance the following proposed Conclusion of Law upon the fourth cause of action, set forth in plaintiff's complaint.

“Based upon the court's findings of fact upon plaintiff's fourth cause of action, the court concludes that plaintiff is not entitled to recover upon its fourth cause of action and that the defendant is entitled to its cost and disbursements upon said fourth cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an

exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff's fourth cause of action.

Exception No. 17.

That on to-wit, the 10th day of August, 1915, this defendant presented to the court for allowance the following proposed Conclusion of Law upon the fifth cause of action, set forth in plaintiff's complaint.

“Based upon the court's findings of fact upon plaintiff's fifth cause of action, the court concludes that plaintiff is not entitled to recover upon its fifth cause of action and that the defendant is entitled to its cost and disbursements upon said fifth cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff's fifth cause of action.

Exception No. 18.

That on to-wit, the 10th day of August, 1915, this defendant presented to the court for allowance the following proposed Conclusion of Law upon the sixth cause of action, set forth in plaintiff's complaint.

“Based upon the court’s findings of fact upon plaintiff’s sixth cause of action, the court concludes that plaintiff is not entitled to recover upon its sixth cause of action and that the defendant is entitled to its costs and disbursements upon said sixth cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff’s sixth cause of action.

Exception No. 19.

That on to-wit, the 10th day of August, 1915, this defendant presented to the court for allowance the following proposed Conclusion of Law upon the seventh cause of action, set forth in plaintiff’s complaint.

“Based upon the court’s findings of fact upon plaintiff’s seventh cause of action, the court concludes that plaintiff is not entitled to recover upon its seventh cause of action and that the defendant is entitled to its costs and disbursements upon said seventh cause of action.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an exception was allowed the defendant to the refusal of the court to allow said Conclusion of Law, upon plaintiff’s seventh cause of action.

Exception No. 20.

That on to-wit, the 10th day of August, 1915, this defendant presented to the court for allowance, the followinig proposed conclusion of law, upon all of the causes of action set forth in plaintiff's complaint.

“And the court concludes that plaintiff is not entitled to recover in this action, for the reason that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the said policy of insurance.”

That the court on said 10th day of August, 1915, disallowed said proposed conclusion of law, and an exception was allowed the defendant to the refusal of the court to allow said conclusion of law, upon plaintiff's complaint.

WHEREUPON the court now being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, now certifies that the foregoing bill of exceptions contains all of the evidence offered or admitted on the trial, together with the rulings of the court, and all of the Findings of Fact and Conclusions of Law, of the court, together with all of defendant's proposed Findings of Fact and Conclusions of Law, and also all of the exhibits introduced at the time of the trial.

WHEREUPON, this bill of exceptions is now here settled, certified and signed this 17th day of August, 1915.

R. S. BEAN, Judge.

Filed August 17, 1915.

G. H. MARSH, Clerk.

PLAINTIFF'S EXHIBIT "A."

Policy No. E-91221.

AETNA LIFE INSURANCE COMPANY,

Accident and Liability Department.

Contractors Employers Liability Policy.

In Consideration of the premium herein provided, the Aetna Life Insurance Company of Hartford, Connecticut (called the Company),

Does Hereby Agree to Indemnify

Insuring Clause.

the Assured described in the Warranties hereof, within the amounts as expressed herein, Against Loss and/or Expense Arising or Resulting from Claims Upon the Assured for Damages on account of bodily injuries and/or death accidentally suffered, or alleged to have been suffered, by an employee or employees of the Assured as provided in said Warrenties, by reason of the business as described and conducted at the locations named there-

in, whether said injuries and/or death are accidentally suffered, or alleged to have been suffered, at the locations named or elsewhere, save and except claims arising by reason of:

- (1) Injuries and/or death to or caused by any person employed in violation of law as to age, or of any age under fourteen (14) years, where there is no legal restriction as to age of employment.
- (2) Liability of others assumed by the Assured under any contract or agreement, oral or written.

Subject to all agreements and conditions hereof, claims are covered whenever arising, on account of accidents or alleged accidents occurring within the Policy period stated herein.

**This Insurance is Subject to the Following
Conditions:**

Reporting Accidents and Claims.

A. Upon the occurrence of an accident covered by this Policy the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company or its duly authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power.

Report and Defense of Suits.

B. If suit is brought against the Assured to enforce a claim for damages covered by this policy he shall immediately forward to the Company every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name and on behalf of the assured.

Co-Operation of Assured.

Expense.

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense or settle any claim, except at his own cost, without the written consent of the Company previously given.

Assurer's Right of Recovery.

D. No action shall lie against the Company to recover for any loss and/or expense under this Policy unless it shall be brought by the Assured for loss and/or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss and/or expense.

Subrogation of Rights.

E. In case of payment of loss and/or expense under this Policy the Company shall be subrogated,

to the amount of such payment, to the Assured's rights of recovery against others for such loss and/or expense, and the Assured shall execute all papers required and shall co-operate with the Company to secure such rights.

Concurrent Insurance.

F. If the Assured carry a policy of another insurer, against any loss and/or expense covered by this Policy, the Assured shall not recover from the Company a larger proportion of the entire loss and/or expense than the amount hereby insured bears to the total amount of valid and collectible insurance applicable thereto.

Change of Interest.

G. No assignment of interest under this Policy shall be valid unless the written consent of the Company is endorsed hereon, signed by its President, a Vice-President, Secretary or Assistant Secretary.

Basis of Premium.

H. The premium is based on the entire compensation earned during the period of this Policy by all persons engaged in the business as described in the Warranties hereof who are not specifically excluded. If such entire compensation exceeds the sum set forth in said Warranties, the Assured shall immediately pay to the Company the additional premium earned. If such entire compensation is less than the sum set forth in said Warranties the Company will return the unearned pre-

mium when determined, but in any event the Company shall retain the minimum premium stated in said Warranties.

Wage Statements.

I. The Assured shall, when requested, furnish the Company with a written statement of the amount of compensation, according to the classifications described in the Warranties hereof, earned by all persons engaged in the business covered by this Policy during the whole or any part of the Policy period. The Company shall be permitted at all reasonable times to examine the books and records of the Assured as respects such compensation, provided a request for such examination is made within one year from the expiration of the Policy period, and the Assured shall render all reasonable assistance. The rendering of any statement of such compensation, or any payment of premium thereon shall not bar the examination herein provided for, nor the Company's right to any additional premium earned.

Inspection.

J. The Company shall be permitted at all reasonable times to inspect the plant, works, machinery and appliances used in the business covered by this Policy.

Cancellation.

K. This Policy may be cancelled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation

shall be effective. The date of cancellation shall then be the end of the Policy period. If such cancellation is at the request of the Assured and he has not retired from the business described in the Warranties hereof, the compensation for the full original Policy period shall be computed upon the basis of the compensation to date of cancellation, and the earned premium calculated at short rates in accordance with the table printed hereon. In any event where cancellation is at the request of the Assured, the Company shall retain not less than the minimum premium stated in said Warranties. Notice of cancellation mailed to the address of the Assured stated in said Warranties shall be a sufficient notice, and the check of the Company similarly mailed a sufficient tender of any unearned premium, when determined.

Alterations in Policy.

L. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein. The personal pro-

noun herein used to refer to the Assured shall apply regardless of number and gender.

Authorized Agents.

M. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, a Vice President, Secretary or Assistant Secretary of the Company.

This space is intended for the attachment of such endorsements as may be executed as provided in the Policy, and, when so executed and attached they are to be construed as a part of the Policy.

Endorsement.

It is hereby agreed that this Policy does not cover any obligation assumed by or imposed upon the Assured by any Workmen's Compensation agreement, plan or law, unless the policy is extended by an endorsement covering such obligation.

E. C. HIGGINS, Secretary.

Endorsement 111539.

(Additional Operations.)

It is hereby understood and agreed that from noon of October 1st, 1913, this Policy, subject to its terms, conditions and agreements, covers the testing and trying out of machinery at the premises described in the policy.

It is further agreed, that the assured will keep a separate record of the actual wage expended in the

prosecution of the work above described, and will pay a premium thereon computed at a rate of one dollar and fifty cents for each one hundred dollars (\$100.00) thereof. (\$1.50)—————

Attached to and forming a part of Policy No. E-91221, dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Department of Hartford, Connecticut, to Portland Gas and Coke Company.

Hartford, Conn., January 3rd, 1914.

E. C. HIGGINS, Secretary.

Endorsement 109879.

(Policy Extended to Expire January 1st, 1914.)

It is hereby understood and agreed that this Policy is extended for a period of three months and twelve days to expire January 1st, 1914, instead of September 20th, 1913, as originally written.

Attached to and forming part of Policy No. E-91221, dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Department of Hartford, Conn., to Portland Gas and Coke Company.

Hartford, Conn., November 5th, 1913.

E. C. HIGGINS, Secretary.

Form 5544—MC.

Endorsement 109126.

(Policy Extended to Expire October 31st, 1913.)

It is hereby understood and agreed that this

Policy is extended for a period of one month and eleven days to expire October 31st, 1913, instead of September 20th, 1913, as originally written.

Attached to and forming part of Policy No. E-91221, dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Department of Hartford, Conn., to Portland Gas and Coke Company.

Hartford, Conn., September 29th, 1913.

E. C. HIGGINS, Secretary.

Endorsement 107057.

Additional Operations.

It is hereby understood and agreed that from noon of May 14th, 1913, this Policy, subject to its terms, conditions and agreements, cover concrete floors or pavements not self bearing, at the premises described in the Policy.

It is further agreed that the assured will keep a separate record of the actual wages expended in the prosecution of the work above described, and will pay a premium thereon computed at a rate of two dollars and eighty-five cents for each one hundred dollars (\$100.00) thereof.

Attached to and forming part of Policy E-91221, dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Depart-

ment of Hartford, Conn., to Portland Gas and Coke Company.

Hartford, Conn., June 11th, 1913.

E. C. HIGGINS, Secretary.

Endorsement 120961.

(Monthly Adjustment of Premium, \$60.00 Deposit.)

1. The advance premium stated in this Policy is not based upon the estimated wages for the full policy, but is the sum hereby agreed to be paid in cash upon delivery of the Policy.

2. On or before the twentieth day of each month succeeding the month in which this Policy is issued the assured shall state to the Company in writing the full amount of compensation earned by his employes during the preceding calender month, or such part thereof as is within the policy period, and pay to the Company in money the entire premium earned upon such compensation at the rates named in the Policy; the advance premium to be applied to the last monthly settlement in the policy period.

3. If the assured shall fail to make such statement or pay such earned premium as provided in the foregoing paragraph such neglect or failure shall entitle the Company, at its option, to cancel the Policy upon ten days' notice to the assured and calculate the earned premium to date of cancellation at short rates, in accordance with the table printed in the Policy.

Attached to and forming part of Policy E-91221,

dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Department, of Hartford, Conn., to Portland Gas and Coke Company.

Hartford, Conn., April 16th, 1913.

J. S. ROWE, Secretary.

Endorsement 120960.

(Schedule of Operations and Rates Applying.)

Classified Description of the business.	Premium rate per \$100.00 of wages.
Timekeepers and watchmen.....	\$2.85
Masons and helpers.....	7.875
Carpenter work interior trim and finish.....	2.85
Carpenters, construction away from shop not bridge building, nor grain elevator construc- tion work	5.25
Tile partition and floors not self bearing.....	2.475
Plumbing, gas, steam and hot water apparatus fitters, and installation of ventilating plants	2.25
Electrical equipment, installation within buildings, exclusively	3.75
Lathers, plasterers and glazing.....	2.85
Plainters, interior work exclusively.....	2.85
Concrete building foundations.....	6.75
Concrete work, buildings, not grain elevator, including the setting up and taking down of frames and falsework.....	9.00
Fire proof tile, construction and repair of partitions	6.75

Cellar excavation, no caissons or sub-aqueous work, including digging holes and filling them with concrete for foundations for buildings	7.875
Gas, works, laying of mains and connections, no tunneling	6.75
Millwrights, placing and erecting of machinery by means of hoisting devices.....	3.90
Pile driving and building foundations and wharf building	7.875
Roofers, gravel or composition.....	4.50
Road or street making.....	3.375

Attached to and forming part of Policy No. E-91221, dated March 20th, 1913, issued by the Aetna Life Insurance Company, Accident and Liability Department, of Hartford, Conn., to Portland Gas and Coke Co.

Hartford, Conn., April 16th, 1913.

J. V. ADAMS, Asst. Secretary.

Short Rate Cancellation Table.

Take the percentage indicated opposite the number of days or months Policy has been in force, upon the premium for the full original Policy period calculated as provided in Condition K, and the result will be the premium earned in case of cancellation. Short rate premium for periods not specifically named in this table must be charged at a rate proportionate to the rate charged for the next preceding and succeeding periods.

POLICIES ISSUED FOR TERM OF ONE YEAR.				POLICIES ISSUED FOR TERM OF THREE YEARS.			
Policy in Force.	PerCent. of Premium.	Policy in Force.	Per Cent of Premium.	Policy in Force.	Per Cent of Premium.	Policy in Force.	Per Cent of Premium.
1 day ..	1%	51 days	27%	1 month ..	8%	19 months..	66%
2 days..	2%	54 days	28%	2 months..	12%	20 months..	68%
3 days..	3%	57 days	29%	3 months..	16%	21 months..	70%
4 days..	4%	60 days	30%	4 months..	20%	22 months..	72%
5 days..	5%	65 days	32%	5 months..	24%	23 months..	74%
6 days..	6%	70 days	34%	6 months..	28%	24 months..	76%
7 days..	6%	75 days	36%	7 months..	32%	25 months..	78%
8 days..	7%	80 days	38%	8 months..	36%	26 months..	80%
9 days..	8%	85 days	39%	9 months..	39%	27 months..	82%
10 days..	9%	90 days or 3 months..	40%	10 months..	42%	28 months..	84%
11 days..	10%	105 days	45%	11 months..	45%	29 months..	86%
12 days..	11%	120 days or 4 months..	50%	12 months..	48%	30 months..	88%
14 days..	12%	135 days	55%	13 months..	50%	31 months..	90%
16 days..	13%	150 days or 5 months..	58%	14 months..	53%	32 months..	92%
18 days..	14%	165 days	64%	15 months..	56%	33 months..	94%
20 days..	15%	180 days or 6 months..	68%	16 months..	59%	34 months..	96%
22 days..	16%	195 days	73%	17 months..	61%	35 months..	98%
24 days..	17%	210 days or 7 months..	75%	18 months..	63%	36 months..	100%
26 days..	18%	225 days	78%				
28 days..	19%	240 days or 8 months..	80%				
30 days..	20%	255 days	81%				
33 days..	21%	270 days or 9 months..	85%				
36 days..	22%	285 days	87%				
39 days..	23%	300 days or 10 months..	90%				
42 days..	24%	315 days	92%				
45 days..	25%	330 days or 11 months..	95%				
48 days..	26%	360 days or 12 months..	100%				

Limits of Indemnity.

N. The Company's liability for loss on account of an accident resulting in bodily injuries and/or death to one person is limited to ten thousand dollars (\$10,000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries and/or death to more than one person is limited to twenty thousand dollars (\$20,000.00.) The Company will, however, as provided in Conditions B and C hereof, pay the expense of litigation in addition to the sum herein limited and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part

thereof as shall not be in excess of the limits of the Company's liability herein expressed.

Policy Period.

O. The Policy period shall be six months, beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, standard time at the location of the business described in the Warranties hereof.

Warranties.

P. The following Warranties, numbered 1 to 11 inclusive, are hereby made a part of this contract, and are acknowledged and warranted by the Assured to be true upon the acceptance of this Policy, except such as are declared to be matters of estimate only.

Warranties.

1. Name of Assured: Portland Gas and Coke Company.

2. Address of Assured: 5th and Yamhill Sts., Portland, Multnomah County, Oregon.

(Name Street, Town, County and State where Head Office is located).

3. The Assured is: Oregon Corporation.

(State whether individual, estate, co-partnership or corporation, and if a corporation name State in which incorporated; if a co-partnership give the names of each member hereof.)

4. CLASSIFIED DESCRIPTION OF THE BUSINESS — All operations incidental to the following business, in and during the continuance thereof.	Estimated Average Number of Employees.	Estimated Entire Compensation for 12 Months.	Premium Rate per \$100 of Compensation.	Estimated Premium	Town, Street and Number Where Business Is Located.
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See Schedule.	Varies.	Monthly Adjustment.	Varies.	\$60.00 Deposit.	Adjoining Government Moorings, between Willamette River and Linnton Road, Multnomah County, Ore.
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SPECIAL OPERATIONS.

Demolition or wrecking of any structure.	None.
Operation of locomotives and/or cars by means of locomotives.	None.

5. The foregoing statement correctly describes the business to be insured, including all usual or special operations incident thereto, and the locations at which said business is conducted. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations, their estimated compensation, and the premium rate, are specifically stated herein.

6. The estimated compensation includes that of all persons engaged in the business as described herein (whether compensated by salary, wages, for piecework, overtime or allowances, and whether paid in cash—in whole or in part—in board, store certificates, merchandise, credits or any substitute for cash), to whom compensation of any nature is

paid, including President, Vice-President, Secretary, Treasurer and Clerical force, except as follows: Prest., Vice-Prest., Secy., Treas., and Office Clerical force.

7. Claims arising by reason of injuries and/or death to persons, whose compensation is excluded herein are not covered, except as to drivers who are specifically enumerated in any concurrent Teams Policy carried by the Assured with this Company while such drivers are employed in operations not connected with the driving or using of teams.

8. If complete and accurate payroll records are not kept corresponding to the classifications herein described the total actual payroll shall be considered as expended under the highest rated classification.

9. No dynamite, nitroglycerine or explosive powder is made, sold, kept or used in the business described herein, except as follows: No exceptions.

10. The deposit premium for this Policy is Sixty and no/100 Dollars (\$60.00), due and payable as follows:

Sixty and no-100 dollars (\$60.00) March 20th, 1913.

11. The minimum premium for this Policy shall be Sixty and no-100 dollars (\$60.00).

In Witness Whereof, the Aetna Life Insurance Company has caused these presents to be signed by its President and Secretary, but the same shall not

be binding unless countersigned by an authorized agent of the Company.

M. G. BUCKELEY, President.

E. C. HIGGINS, Secretary.

Countersigned at Portland, Oregon, this 21st day of April, 1913.

McCARGAR, BATES & LIVELY,
General Agent.

And Afterwards, to-wit, on the 12th day of August, 1915, there was duly filed in said Court, and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

The Aetna Life Insurance Company, a corporation, defendant in the above entitled cause, feeling itself aggrieved by the judgment of the court, in the above entitled action, entered on the 10th day of August, 1915, by which it was adjudged that said plaintiff take judgment against this defendant in the sum of sixteen hundred eighty and 88/100 (\$1680.88) on its first cause of action, with interest thereon at the rate of 6% per annum from April 30th, 1914; upon plaintiff's second cause of action for the sum of two hundred sixty-two and 30/100 dollars (\$262.30) with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the third cause of action for the sum of two hundred dollars, (\$200) with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of one hundred

twenty-five dollars (\$125.00) with interest thereon at the rate of 6% per annum from April 1st, 1914; upon its fifth cause of action for the sum of one hundred and fifty dollars (\$150.00) with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of one hundred seventy-five dollars (\$175.00) with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of two thousand seven hundred eighty-five and 94/100 dollars (\$2784.94) with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for plaintiff's costs, comes now, by its attorney, F. S. Senn, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the 9th Circuit, under and according to the laws of the United States on that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error, and your petitioner will ever pray.

F. S. SENN,

Attorney for Defendant.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the within Petition for

Writ is hereby accepted in Multnomah County, Oregon, this 12th day of August, 1915.

JOHN A. LAING,
One of the Attorneys for Plaintiff.

Filed August 12, 1915.

G. H. MARSH, Clerk.

And Afterwards, to-wit, on the 12th day of August, 1915, there was duly filed in said Court, and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Comes now the defendant, Aetna Life Insurance Company, above named, and in connection with its petition for a writ of error in the above entitled action, alleges that there was error on the part of the District Court of the United States, for the District of Oregon, in regard to matters and things hereinafter set forth, and the defendant thereupon makes this, its assignment of errors:

ASSIGNMENT OF ERROR NO. 1.

That the court erred in overruling Defendant's Demurrer to the Complaint of the plaintiff, said complaint being in words and figures as follows, to-wit:

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

PORTLAND GAS & COKE COMPANY,

a corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff and for its first cause of action against the defendant, complains and alleges:

I.

That plaintiff is a corporation organized and existing under the laws of the State of Oregon and from the 20th day of March, 1913, to the first day of January, 1914, was engaged in the construction of a gas plant and works on its property adjoining Government Moorings, between the Willamette River and the Linnton Road in Multnomah County, Oregon, and employed a large number of men in such work.

II.

That the defendant is a corporation organized and existing under the laws of Connecticut, is engaged in general life, liability and accident insurance and has complied with the laws of Oregon with

reference to foreign insurance companies transacting business within the State of Oregon.

III.

That on or about March 20th, 1913, the defendant upon the request of the plaintiff and upon the payment by plaintiff to defendant of the premiums required, duly made, executed and delivered to plaintiff, policy of insurance numbered "Policy No. E-91221" entitled Contractors Employer's Liability Policy," by which policy the defendant in consideration of the premium provided in the policy, promised and agreed to indemnify the plaintiff against loss and or expense, arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employes of the plaintiff by reason of the said construction work and business conducted by the plaintiff on said premises, adjoining the Government Moorings, whether said injuries are accidentally suffered or alleged to have been suffered at the location or elsewhere, and to defend at its own costs any and all actions brought against the plaintiff to enforce a claim for damages covered by said policy; provided that the plaintiff forthwith forward to the defendant every summons or other process as soon as the same shall have been served upon it; that in said policy it was expressly provided that, subject to all agreements and conditions expressed therein,

claims were covered whenever arising on account of accidents or alleged accidents occurring during the time said policy was in force.

IV.

That the term of said policy was for a period of six months, beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and that by agreements duly made and endorsed on said policy the said policy period was extended from time to time to noon of January 1st, 1914, and that said policy was in full force and effect during all such time.

V.

That in carrying on said construction work on said premises the plaintiff had water carried from certain sources of water supply in that vicinity for use by the employes of the plaintiff for drinking purposes in said construction work on said premises; that there was no drinking water on said premises and the carrying and furnishing of drinking water to its employes was an incident in, and a part of, the construction work carried on by said plaintiff on said premises.

VI.

That during a portion of the months of August and September, 1913, and while said policy of insur-

ance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among others an employe by the name of Louis Weich, who was working for the plaintiff as a common laborer, excavating for concrete foundations, being one of the classified descriptions of business covered by said policy of insurance; that while so employed said Weich drank the water furnished him by the plaintiff; that on or about the 16th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that on or about the 15th day of January, 1914, commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that the water furnished him by the plaintiff herein was unwholesome and unfit for drinking purposes, and that the plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water, but instead thereof delivered to him unwholesome water which was then and there impregnated with typhoid germs and wholly unfit for drinking purposes, and that the plaintiff herein well knew, or by the exercise of reasonable precaution should have known, that the water delivered to him was unwholesome and was impregnated with typhoid germs and was unfit for drinking purposes, and that by reason of his drinking such unwholesome water he contracted typhoid fever, without any fault on his part, and then and there was rendered sick and was on the 16th day of September,

1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed for a long period to-wit; three months, and was made sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and his mental system was permanently shattered and he was seriously and permanently injured in that his heart was inflamed, and the valves and muscles thereof were wholly and permanently incapacitated from performing their normal functions and the lower limbs of Weich were benumbed and paralyzed and he alleged his damages at the sum of twenty thousand dollars (\$20,000) and demanded judgment against plaintiff herein for said sum.

VII.

That plaintiff immediately upon being served with summons and complaint in said action, forwarded to the defendant, the summons and copy of complaint and all processes served upon it in said action, and called upon the defendant to defend such action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of Louis Weich, as it had agreed to do under said policy of insurance, but that the defendant refused to defend said action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally, and that therefor said policy did not

cover such claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Weich upon proof of all the allegations of said complaint, that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Louis Weich and against the plaintiff herein in the sum of \$700.00 and his costs and disbursements; that thereafter plaintiff settled and compromised said judgment by paying to said Louis Weich in full settlement and compromise of said claim and said judgment the sum of \$600.00 on or about the 30th day of April, 1914; that the expense reasonably incurred by the plaintiff herein in the defense and settlement of said action and the actual loss and expense sustained and paid in money by plaintiff herein arising or resulting from said claim upon the plaintiff, including said sum paid to said Louis Weich amounted to the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) and is itemized as follows:

Filing fee, less refund.....	\$ 2.90
Automobile hire	21.38
Attorney's and Claim Agent's fees	588.80
Reporter's fees	232.90
Witness fees	75.70
Doctor's fees (expert testimony).	160.00
Sum paid in compromise settlement	600.00
	<hr/>
	\$1680.88

That said sums were paid by the plaintiff between the dates of February 1st and April 30th, 1914, and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) together with interest thereon at the rate of six per cent per annum from the 30th day of April, 1914, until paid, no part of which has been paid.

VIII.

That plaintiff has complied with all the conditions named in said policy on its part to be performed as conditions precedent to its right to bring this action insofar as said conditions could be complied with by it, in view of defendant's denial of liability and its refusal to defend said claim or to live up to its obligations under said policy, and that the above claims does not fall within any of the excepted claims mentioned in said policy and is within the limits of liability fixed by said policy and is a claim covered by said policy.

IX.

That the sum of one hundred sixty-eight dollars (\$168.00) is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a second cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this second cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, the plaintiff had in its employ on said construction work on said premises, among other, an employe by the name of Joseph Duerst, who was working for the plaintiff as a common *labor* at pile driving, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed said Duerst drank the water furnished to him by the plaintiff, and that on or about the 30th day of September, 1913, he quit the employ of plaintiff on account of having contracted typhoid fever, and that on the 9th day of April, 1914, commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that between the first day of August, 1913, and the 30th day of September, 1913, he was employed by the plaintiff herein in and about the construction of said gas plant and factory, and that during all of said time, pursuant to his said employment, plaintiff herein undertook to deliver to him unwholesome water for drinking pur-

poses while he was engaged in said work, and that the plaintiff herein in utter disregard to its duty and obligation to furnish him, with unwholesome water, carelessly and negligently and without due consideration of his health, furnished and delivered to him for drinking water which, was then and there impure, unwholesome, impregnated with disease germs and with typhoid fever germs and wholly unfit for drinking purposes and that the plaintiff well knew, or by the exercise of reasonable precaution should have known that the water so delivered was impure and unwholesome and impregnated with disease germs and with typhoid fever germs and wholly unfit for drinking purposes; that he used said water so furnished by the plaintiff herein, and by reason of drinking said water contracted typhoid fever and was thereby rendered sick and ill and was on the said 30th day of September, 1913, confined to his bed and by reason of said illness and for a period of three months thereafter was sick, ill and incapacitated from said disease and compelled to remain in bed under the care of doctors and nurses and was disabled and his vitality and physical depleted to a considerable extent and that as a result of drinking said water and of contracting said disease he contracted psoriasis, and that his body and face have been as a result of the alleged negligence and carelessness of the plaintiff herein affected, blotched, discolored, disfigured and broken out in inflamed spots and sores and that he has become permanently disabled and unable to

perform manual or other labor to his damage in the sum of twenty thousand (\$20,000.00) dollars, and that he has been compelled to expend one hundred twenty-seven dollars (\$127.00) for hospital bills and seventy-five dollars (\$75.00) for doctor bills and he demanded judgment against the plaintiff herein for said sum.

III.

That the plaintiff herein immediately upon being served with summons and complaint in said action, forwarded to the defendant the summons and copy of complaint and all processes served upon it, in said action and called upon the defendant to defend such action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of Joseph Duerst as it had agreed to do under said policy of insurance, but that the defendant refused to defend said action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff herein thereupon employed attorneys and incurred expense in the defense of such action, that it filed an answer denying all liability and that after said case was at issue the plaintiff herein settled and compromised said claim and said action by paying to said Joseph Duerst in full settlement and compromise of his said claim the sum of one hun-

dred fifty dollars (\$150.00) on or about the 31st day of August, 1914; that the expense reasonably incurred by the palintiff herein in the defense and settlement and compromise of said action and the loss and expense sustained and paid in money by the plaintiff herein arising or resulting from said claim upon it, including said sum paid to Joseph Duerst amounted to the sum of two hundred sixty-two dollars and thirty cents (\$262.30) and is itemized as follows:

Settlement and compromise with	
Duerst	\$150.00
Clerk's fees, less refund.....	.95
Doctor's fees in examination.....	15.00
Attorney's and Claim Agent's fees.	96.35
	<hr/>
	\$262.30

That said sums were paid between the dates of April 1st and August 31st, 1914, and that there is now due and owing to the plaintiff from the defendant said sum of two hundred sixty-two dollars and thirty cents (\$262.30) together with interest thereon at the rate of six per cent per annum from the 31st day of August, 1914, no part of which has been paid.

IV.

That the sum of twenty-six dollars (\$26.00) is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a third cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in his third cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during the months of July and August, and the first part of September, 1913, while said policy of insurance was in full force and effect the plaintiff had in its employe on said construction work on said premises, among others, an employe by the name of C. Hastings, who was working for the plaintiff as a common *labor* as stock and time keeper, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Hastings drank the water furnished him by the plaintiff, and that on or about the 10th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein, in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Hastings that the water furnished him for drinking purposes by the plaintiff herein was impure, and unwholesome and im-

pregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water was impure, and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 10th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish, and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff, unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Hastings, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Hastings but that the defendant denied all liability for said claim and

refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred fifty dollars (\$150.00) which sum was paid unto said Hastings on or about the 1st day of September, 1914, in full settlement of said claim, that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of fifty dollars (\$50.00) in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of two hundred dollars together with interest thereon at the rate of six per cent per annum from December 1st, 1914.

IV.

That the sum of twenty dollars is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a fourth cause of action against the defendant complains and alleges:

1.

Plaintiff incorporates in this fourth cause of action by reference thereto and makes a part here-

of, paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of Otto Bush, who was working for the plaintiff as a carpenter, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Bush drank the water furnished him by the plaintiff and that on or about the 8th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action, and that a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Bush that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of

carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 8th day of September, 1913, and was confined to his bed by reason of having typhoid fever, and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Bush, and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Bush but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred dollars, which sum was paid unto said Bush on or about the first day of April, 1914, in full settlement of said claim and compromise of said claim and the actual loss and expense

incurred by the plaintiff herein arising or resulting from said claim upon plaintiff amounted to the sum of twenty-five dollars (\$25.00) in addition to said sum of one hundred dollars and that there is now due and owing to the plaintiff from defendant on account of said claim said sum of one hundred twenty-five dollars together with interest thereon at the rate of six per cent per annum from April 1st, 1914.

IV.

That the sum of twelve dollars and fifty cents is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a fifth cause of action against the defendant, complains and alleges:

I.

Plaintiff incorporates in this fifth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of George Harbick, who was working for the plaintiff as a

common laborer in the insulation of electrical equipment, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Harbick drank the water furnished him by the plaintiff and that on or about the 11th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff herein in the hands of attorneys for action and that a claim for damages for the bodily injuries suffered by him was made on the plaintiffs herein and it was claimed by said Harbick that the water furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff knew or by the exercise of reasonable care and caution should have known, that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff herein; that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work; that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great

bodily injury and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Harbick and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Harbick, but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred twenty-five dollars, which sum was paid unto said Harbick on or about the first day of March, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars (\$25.00) in addition to said sum of one hundred twenty-five dollars and that there is now due and owing to the plaintiff from defendant on account of said claim the sum of one

hundred fifty dollars together with interest thereon at the rate of six per cent per annum from March 1st, 1914.

IV.

That the sum of fifteen dollars is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a sixth cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this sixth cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5, and 8 of its first cause of action.

II.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of F. Kohl, who was working for the plaintiff as a common *labor*, engaged in road making, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed the said Kohl drank the water furnished him by the plaintiff, and that on or about the 11th day of Sep-

tember, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever, and that thereafter he placed his claim for damages against the plaintiff in the hands of attorneys for action, and *tha* a claim for damages for the bodily injuries suffered by him was made on the plaintiff herein and it was claimed by said Kohl that the furnished him for drinking purposes by the plaintiff herein was impure and unwholesome and impregnated with typhoid germs and that plaintiff knew, or by the exercise of reasonable care and caution should have known that the water was impure and unwholesome and impregnated with typhoid germs and wholly unfit for drinking purposes, and that he contracted typhoid fever from drinking said water and that his sickness and injury were the result of carelessness and negligence on the part of the plaintiff, that he came down sick on or about the 11th day of September, 1913, and was confined to his bed by reason of having typhoid fever and was compelled to remain in bed for a long time and was sick, sore, lame and disordered and wholly incapacitated for work, that he endured great pain, suffering and mental anguish and that his system was permanently shattered and that he suffered great bodily injury, and demanded that the plaintiff herein settle with him and he threatened to bring action against the plaintiff unless settlement were made.

III.

That plaintiff herein immediately upon learning of said case of typhoid fever notified the defendant of the same and also immediately notified the defendant of said claim being made upon it by said Kohl and called upon the defendant to indemnify the plaintiff against said claim and all loss and expense arising or resulting or that might arise or result from said claim of said Kohl but that the defendant denied all liability for said claim and refused to have anything to do with said claim and denied that said policy of insurance covered said claim; that the plaintiff herein in order to avoid litigation settled and compromised said claim for the sum of one hundred fifty dollars, which sum was paid unto said Kohl on or about the 1st day of March, 1914, in full settlement of said claim; that the reasonable expense incurred by the plaintiff herein in settlement and compromise of said claim and the actual loss and expense incurred by the plaintiff herein arising or resulting from said claim upon the plaintiff amounted to the sum of twenty-five dollars in addition to said sum of one hundred fifty dollars and that there is now due and owing to the plaintiff from defendant on account of said claim, the sum of one hundred seventy-five dollars, together with interest thereon at the rate of six per cent per annum from March, 1914.

IV.

That the sum of seventeen dollars and fifty cents

is a reasonable sum for the court to allow as attorney's fees in this cause of action.

Plaintiff for a seventh cause of action against the defendant complains and alleges:

I.

Plaintiff incorporates in this seventh cause of action by reference thereto and makes a part hereof paragraphs 1, 2, 3, 4, 5 and 8 of its first cause of action.

III.

That during a portion of the months of August and September, 1913, while said policy of insurance was in full force and effect, plaintiff had in its employ on said construction work on said premises, among others, an employe by the name of I. M. Andrus, who was working for the plaintiff as a millwright in erecting the machinery for the briquetting plant, being one of the classified descriptions of business covered by said policy of insurance, and that while so employed as such millwright said I. M. Andrus drank the water furnished him by the plaintiff and that on or about the 7th day of September, 1913, he quit the employ of the plaintiff on account of having contracted typhoid fever and that on or about the 13th day of February, 1913, he commenced an action against the plaintiff herein in the Circuit Court of the State of Oregon

for Multnomah County, in which he alleged that the water furnished him by the plaintiff was unwholesome and unfit for drinking purposes and that plaintiff herein carelessly and negligently failed to deliver to him wholesome drinking water but instead thereof delivered to him unwholesome and impure water which was then and there impregnated with typhoid germs and wholly unfit for drinking purposes and that the plaintiff herein knew, or by the exercise of reasonable care and caution should have known, that the water delivered to him was unwholesome and was impregnated with typhoid germs and was unfit for drinking purposes; that by reason of his drinking such unwholesome water he contracted typhoid fever without any fault on his part and was then and there rendered sick and was on the said 11th day of September, 1913, confined to his bed by reason of typhoid fever and was compelled to remain in bed and in the hospital for eleven and one-half weeks and that by reason of and as a direct and proximate result of said careless and negligent act on the part of the plaintiff herein in furnishing said impure and unwholesome water he suffered great pain and mental anguish, suffered from *delirium*, high fever and unconsciousness and that his brain, spinal cord, nerves and nervous system generally were poisoned and inflamed; that he suffered paralysis of certain muscles of his arms and legs and that he had toe drop in his left foot and an incomplete wrist drop in his right hand and was numb to pin prick over part of

the back of his right hand and forearm and over the front of his left leg and ankle and that he was permanently injured and incapacitated from performing any work whatever; that he alleged his damages at the sum of twenty-five thousand dollars, with three hundred forty-seven dollars special damages for hospital and doctor fees and demanded judgment against the plaintiff herein for said sum.

III.

That plaintiff immediately upon being served with summons and complaint in said action forwarded to the defendant a copy of said summons and complaint and all processes served upon it in said action, and called upon the defendant to defend said action in the name and on behalf of the plaintiff herein and demanded that the defendant indemnify the plaintiff against all loss and or expense arising or resulting from said claim of I. M. Andrus, as it had agreed to do under said policy of insurance; but that the defendant refused to defend such action and denied all liability therefor on the sole ground that said claim did not arise from bodily injuries suffered accidentally and that therefore said policy did not cover said claim; that the plaintiff thereupon employed attorneys and incurred expense in the defense of said action; that it filed answer denying liability and put said Andrus upon proof of all the allegations of said complaint that said case was duly and regularly heard and tried by a jury duly empanelled in said court and cause and that said trial resulted in a verdict in favor of said Andrus

and against the plaintiff herein in the sum of fifty-five hundred dollars and his costs and disbursements taxed at sixty-four dollars and ninety-five cents; that thereafter plaintiff herein appealed said case to the Supreme Court of the State of Oregon and while said appeal was pending a compromise settlement was made and effected between the plaintiff herein and said I. M. Andrus in which said judgment and claim of said Andrus against the plaintiff herein was compromised and settled for the sum of sixteen hundred thirty-five dollars on or about the 22nd day of March, 1915; that the expense reasonably incurred by the plaintiff herein in the defense of said action and in appeal to the Supreme Court and in the settlement thereof and the actual loss and expense sustained and paid in money by the plaintiff herein arising and resulting from said claim upon the plaintiff herein by said I. M. Andrus amounted to the sum of twenty-seven hundred eighty-five dollars and ninety-four cents and is itemized as follows:

Fees in Circuit Court.....	9.15
Witness fees and expert testimony.	90.00
Reporter's fees	150.00
Automobile expense	1.75
Appeal bond	27.50
Filing fee in Supreme Court and copy of transcript	28.48
Printed abstract and briefs in Su- preme Court	82.16
Attorney's and Claim Agent's fees	761.20
Amount paid in compromise settle- ment	1635.00
	<hr/>
	\$2785.94

That said sums were paid by the plaintiff herein between the dates of February 13th, 1915, and March 22nd, 1915, and that there is now due and owing to the plaintiff herein from the defendant on account of said claim said sum of twenty-seven hundred eighty-five dollars and ninety-four cents, together with interest thereon at the rate of six per cent per annum from the 22nd day of March, 1915, until paid, no part of which has been paid.

IV.

That the sum of two hundred seventy-eight dollars and sixty cents is a reasonable sum for the court to allow as attorney's fees in this seventh cause of action.

WHEREFORE, plaintiff demands judgment against the defendant herein on its first cause of action for the sum of sixteen hundred eighty dollars and eighty-eight cents (\$1680.88) with interest thereon at the rate of six per cent per annum from April 30th, 1914, together with the sum of one hundred sixty-eight dollars (\$168.00) attorney's fees; for the sum of two hundred sixty-two dollars and thirty cents (\$262.30) with interest thereon at the rate of six per cent per annum from the 31st day of August, 1914, together with the sum of twenty-six dollars (\$26.00) attorney's fees in the second cause of action; for the sum of two hundred dollars (\$200.00) with interest thereon at the rate of six per cent per annum from December 1st, 1914, together with the

sum of twenty dollars (\$20.00) attorney's fees in the third cause of action; for the sum of one hundred twenty-five (\$125.00) with interest thereon at the rate of six per cent per annum from April 1st, 1914, together with the sum of twelve dollars and fifty cents (\$12.50) attorney's fees in the fourth cause of action; for the sum of one hundred fifty dollars (\$150.00) with interest thereon at the rate of six per cent per annum from March 1st, 1914, together with the sum of fifteen dollars (\$15.00) attorney's fees in the fifth cause of action; for the sum of one hundred seventy-five dollars (\$175.00) with interest thereon at the rate of six per cent per annum from March 1st, 1914, together with seventeen dollars and fifty cents attorney's fees in the sixth cause of action and for the sum of twenty-seven hundred eighty-five dollars and ninety-four cents (\$2785.94) with interest thereon at the rate of six per cent per annum from March 22nd, 1915, together with two hundred seventy-eight dollars and sixty cents attorney's fees in the seventh cause of action and for plaintiff's costs and disbursements incurred herein.

JOHN A. LAING,
JOHN F. LOGAN,
H. W. STRONG,
Attorneys for Plaintiff.

That the demurrer to said complaint was as follows:

*In the District Court of the United Statse for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,

a Corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a Corporation,

Defendant.

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

SENN-EKWALL and RECKEN,

Attorneys for Defendant.

I, F. S. Senn, one of the attorneys for the defendant, hereby certify that the foregoing demurrer is made in good faith, and is not made for the purpose of hindering or delaying the trial of the above entitled action, and I believe that the point raised by said demurrer is well taken.

F. S. SENN.

That the order overruling said demurrer was as follows:

*In the District Court of the United Statse for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,

a Corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a Corporation,

Defendant.

Portland, Oregon, Monday, June 21st, 1915.

R. S. BEAN, D. J. (ORAL).

The case of the Portland Gas & Coke Company vs. the Aetna Life Insurance Company is an action on an indemnity policy by which the Company agreed to indemnify the plaintiff against any loss and (or) expense arising or resulting from claim upon the assured for damages on account of bodily injuries and (or) death accidentally suffered by an employe.

Certain employes of the plaintiff company contracted typhoid fever from water furnished for their use by the plaintiff. They brought actions against the plaintiff company, and recovered damages on account thereof, and the question for decision in

this case is whether that constitutes a bodily injury accidentally received or suffered within the meaning of this policy.

It will be observed that the language of this policy is exceedingly broad. It differs from many indemnity policies in that liability is not limited to injuries received from external violence nor to accidents which result in producing visible external marks or injuries, or evidence of violence, but it is a *board* indemnity against injuries resulting from accidental causes.

Now, the English Workmen's Compensation Act of 1897 provided for compensation to workmen for personal injury by accident arising in the course of their employment. While a workman was engaged in sorting wool a bacillus passed from the wool to his eye afflicting him with anthrax from which he died. On appeal to the Privy Counsel, it was held that the injury was due to an accident within the meaning of *of* this law, because first it was an accident that the bacillus happened to be in the wool; second, it was an accident that it settled on the workman in a delicate or tender spot, and third, it was an accident that the poison found its way into the workman's system and caused his death, and, therefore, the court held that the case came within the Compensation Act. On the same reasoning it could be properly held in this case that the injury here was an accident because it was an accident that the typhoid germs happened to be in the water furnished the

plaintiff's employes, and, second, it was an accident that the germ found favorable opportunity for development in the workmen.

A similar ruling was *announced* by the Supreme Court of Massachusetts in *Hood vs. Maryland Casualty Company*, 206 Mass. The policy in that case provided indemnity against loss from liability for damages on account of bodily injuries accidentally suffered, similar to the policy under consideration. The employe was a hostler and in the course of his employment he contracted glanders, through negligence of his employer. The court held the insurance company liable because the infection which caused the disease was due to accident.

So also in the case of *Columbia Paper Company vs. The Fidelity and Casualty Company*, 104 Mo. *Ac.*, a policy similar to the one now in controversy. The employe contracted a kidney disease by handling infected wool rags, and the court held it was within the terms of the policy, and the insurance company liable.

It is sought to distinguish those cases from the one at bar because it is claimed that in the cases referred to there was an abrasion of the body through which the poison entered the system, but as stated in the English case, that fact is immaterial because it was a more fortuitous accident that it came in contact with this particular spot, and where some affliction of our physical frame is in any way induced by acci-

dent. We should be on our guard that we are not misled by medical phrases to allow the proper *allication* of the phrase accident causing the injury, because the injury inflicted by the accident sets up a condition of things which medical men denominate disease.

Under these circumstances and they seem to be directly in point, I conclude that the injuries referred to in the complaint come within the terms and provisions of this policy, and the demurrer should be overruled.

ASSIGNMENT OF ERROR NO. 2.

That the court erred upon the trial of this cause in making the following Findings of Fact, and Conclusions of Law:

*In the District Court of the United Statse for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,
a Corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,
a Corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on duly and regularly for trial in open court upon the issues raised by the pleadings herein before the court, without a jury, having been expressly waived by written stipulation and consent of the parties duly filed in this cause; the plaintiff appeared and was represented in court by John A. Laing and H. W. Strong, its attorneys, and the defendant by Senn-Ewkall and Recken, its attorneys, whereupon the court duly heard the testimony of certain witnesses and heard the evidence presented by the plaintiff, the defendant producing no witnesses or evidence, and the court being fully advised in the premises, now makes its findings of fact and conclusions of law, as follows:

Findings of Fact.

The court finds generally for the plaintiff and against the defendant upon each of the seven causes of action set out in plaintiff's complaint.

Conclusions of Law.

The court concludes that plaintiff is entitled to judgment against the defendant upon the first cause of action for the sum of \$1680.88 with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30 with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the

third cause of action for the sum of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for its costs and disbursements incurred herein taxed at the sum of \$., and that execution issue therefor.

Dated at Portland, Oregon, August 10th, 1915.

R. S. BEAN, Judge."

ASSIGNMENT OF ERROR NO. 3.

That the court erred in rendering the following Judgment, in favor of the plaintiff and against the defendant, said Judgment being in words and figures as follows, to-wit (*ommitting* the venue and title):

"This cause coming on regularly for trial before the court without a jury, a jury having been expressly waived by the parties hereto by written stipulation duly filed with the clerk of this court, the plaintiff appearing by its attorneys, John A.

Laing and H. W. Strong, and the defendant by its attorneys, Senn, Ekwall and Recken, and the court having heard and considered the testimony and evidence herein, and having made and filed its findings of fact and conclusions of law herein and being fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED that the plaintiff have and recover judgment against the defendant upon the first cause of action herein for the sum of \$1680.88 with interest thereon at the rate of 6% per annum from April 30th, 1914; upon the second cause of action for the sum of \$262.30 with interest thereon at the rate of 6% per annum from August 31st, 1914; upon the third cause of action for the sum of \$200.00 with interest thereon at the rate of 6% per annum from December 1st, 1914; upon the fourth cause of action for the sum of \$125.00 with interest thereon at the rate of 6% per annum from April 1st, 1914; upon the fifth cause of action for the sum of \$150.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; upon the sixth cause of action for the sum of \$175.00 with interest thereon at the rate of 6% per annum from March 1st, 1914; and upon the seventh cause of action for the sum of \$2,785.94 with interest thereon at the rate of 6% per annum from March 22nd, 1915; and for its costs and disbursements incurred herein taxed at the sum of \$.....and that execution issue therefor.

Dated at Portland, Oregon, August 10th, 1915.

R. S. BEAN, Judge."

ASSIGNMENT OF ERROR NO. 4.

That the court erred in disallowing defendant's proposed finding of fact, as to plaintiff's first cause of action, said proposed finding of fact being as follows, to-wit:

I.

"That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor's Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked Plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendant shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work, plaintiff supplied to one Louis Weich water for drinking purposes during the months of August and September, 1913, and while the aforesaid policy was in full force and effect. That said Louis Weich by reason of drinking said water so furnished by plaintiff contracted typhoid fever and afterwards, to-wit:

On the 15th day of January, 1914, said Louis Weich brought action against the plaintiff in the Circuit Court of the State of Oregon, for Multnomah County, in which he alleged that the water furnished him by the plaintiff was unwholesome and unfit for drinking purposes and that the plaintiff was careless and negligent in furnishing him such unwholesome drinking water and that by reason of said action, this plaintiff was required to incur expense in defending said action, as follows, to-wit:

Filing fees, less refund.....	\$ 2.90
Automobile hire	21.38
Attorney's and Claim Agent's fees	588.00
Reporter's fees	232.90
Witness fees	75.00
Doctor's fees (expert testimony)...	160.00
Sum paid in compromise settlement	600.00
	<hr/>
	\$1680.88

That said sum was paid by the plaintiff and is a reasonable disbursement in said action of Louis Weich, being the first cause of action set forth in plaintiff's complaint.

VII.

That said sum of \$1680.88 was paid by this plaintiff on the 30th day of April, 1914. That the injuries suffered by the said Louis Weich resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for

indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.”

ASSIGNMENT OF ERROR NO. 5.

That the court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's second cause of action, said proposed Finding of Fact being as follows, to-wit:

I.

The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered for a valuable consid-

eration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy, and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one Joseph Duerst, an employee of

plaintiff, water to drink; that said Joseph Duerst claims that he contracted typhoid fever from drinking said water and on the 9th day of April, 1914, said Joseph Duerst commenced an action in the Circuit Court of the State of Oregon for Multnomah County, claiming that this plaintiff had been negligent in supplying his unwholesome and unfit drinking water; that said plaintiff was compelled to contest and defend said action at its own expense, defendant having declined to defend said action as provided by the policy; that this plaintiff in defending said action and in compromising the same was required to make the following expenditures:

Settlement and compromise with	
Joseph Duerst	\$150.00
Clerk's fees less refund.....	.95
Doctor's fees in examination.....	15.00
Attorney's and claim agent's fees...	96.35
<hr/>	
\$ 262.30	

That said sum of \$262.30 was paid by the plaintiff and is a reasonable disbursement in said claim of said Joseph Duerst, being the plaintiff's second cause of action herein.

VII.

That said sum of \$262.30 was paid by this plaintiff on the 31st day of August, 1914; that the injuries suffered by the said Joseph Duerst resulted from typhoid fever; that the policy of insurance

issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy."

ASSIGNMENT OF ERROR NO. 6.

That the Court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's third cause of action, said proposed Finding of Fact being as follows, to-wit:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant

made, executed and delivered for a valuable consideration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employees of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plain-

tiff supplied to one C. Hastings drinking water, during the months of July, August and September in the year 1913; that said C. Hastings alleged that he contracted typhoid fever from drinking said water; that said water was unwholesome and unfit and that plaintiff was negligent in furnishing the same to said C. Hastings; that said C. Hastings made claim against this plaintiff for damages by reason of injuries suffered in contracting said typhoid fever from drinking said water and threatened to bring action against plaintiff unless settlement was made, that plaintiff incurred and paid in disposing of said claim of said C. Hastings, the following sum:

Paid in settlement to said C. Hastings	\$150.00
Attorney's fees	50.00
	<hr/>
	\$200.00

That said sum of \$200.00 is a reasonable disbursement in said claim of said C. Hastings and was paid by this plaintiff; that defendant denied liability under its policy of insurance on the ground that typhoid fever was not covered under said policy and was not a bodily injury accidentally suffered.

VII.

That said sum of \$200.00 was paid by this plaintiff on the 1st day of December, 1914; that the in-

juries suffered by the said C. Hastings resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.”

ASSIGNMENT OF ERROR NO. 7.

That the court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's fourth cause of action, said proposed Finding of Fact being as follows, to-wit:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon; and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance, in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered for a valuable consideration a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked plaintiff's exhibit "A."

IV.

That said policy among other things provides that the defendant shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employees of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon, and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months, beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plaintiff supplied to one Otto Bush drinking water; that said Otto Bush claims that said water was contaminated, impregnated and unfit and that as a result of drinking said water he contracted typhoid fever; that the defendant company claimed and contended that typhoid fever was not a bodily injury accidentally suffered and declined to defend against said claim; that said Otto Bush threatened suit against this plaintiff by reason of said illness. Whereupon this plaintiff paid in disposing of said claim of Otto Bush, the following sums:

Settlement and compromise of claim	
of said Otto Bush.....	\$100.00
Attorney's fees	25.00
	<hr/>
	\$125.00

That said sum of \$125.00 is a reasonable disbursement of said claim of Otto Bush and was paid by plaintiff.

VII.

That said sum of \$125.00 was paid by this plaintiff on the 1st day of April, 1914; that the injuries suffered by the said Otto Bush resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suf-

ferred or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of the policy.”

ASSIGNMENT OF ERROR NO. 8.

That the court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's fifth cause of action said proposed Finding of Fact being as follows, to-wit:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable

consideration, a policy of insurance, being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employee or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that the defendant defend at its own costs any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work plain-

tiff supplied to one George Harbick, drinking water which said George Harbick claims was contaminated, unwholesome and unfit and from which he claims he contracted typhoid fever and claimed that plaintiff had been negligent and careless in furnishing him said drinking water and threatened to bring suit against this plaintiff by reason of sad negligence; whereupon plaintiff was required to and did in disposing of said claim make the following payments:

Paid in settlement to George Har-	
bick	\$125.00
Attorney's fees	25.00
	<hr/>
	\$150.00

That said sum was paid by the plaintiff and is a reasonable disbursement; that the defendant denied liability under its policy on the ground that said policy did not cover injuries resulting from typhoid fever and that typhoid fever is not a bodily injury accidentally suffered.

VII.

That the said sum of \$150.00 was paid by this plaintiff on March 1st, 1914. That the injuries suffered by the said George Harbick resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally

suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy."

ASSIGNMENT OF ERROR NO. 9.

That the court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's sixth cause of action, said proposed Finding of Fact being as follows, to-wit:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consid-

eration, a policy of insurance being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof, and is marked plaintiff's exhibit "A."

IV.

That said policy among other things provides that the defendant shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1914.

VI.

That in carrying on said construction work, plaintiff furnished drinking water to one F. Kohl; that

said F. Kohl claimed said water was unwholesome, unfit and contaminated with typhoid germs and as a result of drinking said water, said F. Kohl claims he contracted typhoid fever and alleged that plaintiff was careless and negligent in furnishing him said unwholesome and unfit water, and threatened suit against this plaintiff; that in disposing of said claim of said F. Kohl, plaintiff made the following payments:

Paid F. Kohl in settlement.....	\$150.00
Attorney's fees	25.00
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	\$175.00

That said sum was paid by the plaintiff and is a reasonable disbursement in said claim of said F. Kohl; that defendant denied liability under its policy contending that typhoid fever was not a bodily injury accidentally suffered and refused to accept or pay said disbursements.

VII.

That said sum of \$175.00 was paid by this plaintiff on the 1st day of March, 1914; that the injuries suffered by the said F. Kohl resulted from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy."

ASSIGNMENT OF ERROR NO. 10.

That the court erred in disallowing defendant's proposed Finding of Fact, as to plaintiff's seventh cause of action, said proposed Finding of Fact being as follows, to-wit:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and from the 20th day of March, 1913, to the 1st day of January, 1914, was engaged in the construction of a gas plant on the Linnton Road, in Multnomah County, Oregon, near the Government Moorings.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in general life, liability and accident insurance in the State of Oregon.

III.

That on or about March 20th, 1913, this defendant made, executed and delivered, for a valuable consideration, a policy of insurance, being numbered E-91221 and entitled "Contractor Employer's Liability Policy" and which policy was introduced in evidence and made a part hereof and is marked plaintiff's Exhibit "A."

IV.

That said policy among other things provides that the defendants shall indemnify the plaintiff against loss and or expense arising or resulting from claims upon the plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by an employe or employes of the plaintiff by reason of plaintiff's construction work and business conducted by the plaintiff on its premises on the Linnton Road, Multnomah County, Oregon; and that defendant defend at its own cost any and all actions brought against plaintiff to enforce a claim for damages.

V.

That the term of said policy was for a period of six months beginning on the 20th day of March, 1913, at noon, and ending on the 20th day of September, 1913, at noon, and by agreements duly made and endorsed on said policy the same was extended from time to time until noon of January 1st, 1913.

VI.

That in carrying on said construction work, plaintiff supplied to one I. M. Andrus drinking water during the months of July, August and September; that said I. M. Andrus claims that he contracted typhoid fever from the drinking of such water; that said water was contaminated with typhoid germs

and that plaintiff was careless and negligent in furnishing such contaminated water to its employes; that on the 13th day of February, 1914, said I. M. Andrus brought action against the plaintiff in the Circuit Court of Multnomah County, for the State of Oregon, and for damages resulting from said illness contracted as he claims from drinking said water; that plaintiff in defending said claim and suit incurred and paid the following sums of money:

Fees in Circuit Court.....	\$ 9.15
Witness fees and expert testimony	90.00
Reporter's fees	150.00
Automobile expense	1.75
Appeal bond	27.30
Filing fee in Supreme Court and copy of transcript.....	28.48
Printed abstract and briefs in Su- preme Court	82.16
Attorney's and Claim Agent's fees	761.20
Amount paid in compromise settle- ment	1635.00
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	\$2785.94

That said sum was paid by the plaintiff and is a reasonable disbursement; that defendant denied liability under its policy on the ground that typhoid fever was not a bodily injury *accidentally* suffered.

That said sum of \$2785.94 was paid by this plaintiff on the 22nd day of March, 1915; that the injuries suffered by the said I. M. Andrus resulted

from typhoid fever; that the policy of insurance issued by the defendant to the plaintiff provides for indemnity on account of bodily injuries accidentally suffered or alleged to have been suffered; that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview or terms of said policy.”

ASSIGNMENT OF ERROR NO. 11.

That the court erred in disallowing defendant's proposed general Finding of Fact upon all the causes of action set forth in plaintiff's complaint, said proposed general Finding of Fact being as follows, to-wit:

“And generally the court finds that said Louis Weich, Joseph Duerst, C. Hastings, Otto Bush, George Harbick, F. Kohl and I. M. Andrus were all employes of the plaintiff company during the months of July, August and September, and particularly during the time that said employes contracted said typhoid fever; that the defendant company contended that said policy of insurance did not cover typhoid fever for the reason that typhoid fever was not a bodily injury accidentally suffered and declined to indemnify plaintiff for any disbursement that plaintiff might make; that the damages claimed by said employes were all for typhoid fever resulting from the drinking of water which was furnished said employes by plaintiff during the working hours of said plaintiff.”

ASSIGNMENT OF ERROR NO. 12.

That the court erred in disallowing defendant's proposed Conclusions of Law, as to plaintiff's first cause of action, said proposed conclusion of law being as follows, to-wit:

"Based upon the court's Findings of Fact upon plaintiff's first cause of action, the court concludes that plaintiff is not entitled to recover upon its first cause of action and that the defendant is entitled to its costs and disbursements upon said first cause of action."

ASSIGNMENT OF ERROR NO. 13.

That the court erred in disallowing defendant's proposed Conclusion of Law, as to plaintiff's second cause of action, said proposed conclusion of law being as follows, to-wit:

"Based upon the court's Findings of Fact upon plaintiff's second cause of action the court concludes that plaintiff is not entitled to recover upon its second cause of action and that the defendant is entitled to its costs and disbursements upon said second cause of action."

ASSIGNMENT OF ERROR NO. 14.

That the court erred in disallowing defendant's proposed Conclusion of Law, as to plaintiff's third

cause of action, said proposed Conclusion of Law being as follows, to-wit:

“Based upon the court’s Findings of Fact upon plaintiff’s third cause of action, the court concludes that plaintiff is not entitled to its costs and disbursements upon said third cause of action.”

ASSIGNMENT OF ERROR NO. 15.

That the court erred in disallowing defendant’s proposed Conclusion of Law, as to plaintiff’s fourth cause of action, said proposed Conclusion of Law being as follows, to-wit:

“Based upon the court’s Findings of Fact upon plaintiff’s fourth cause of action, the court concludes that plaintiff is not entitled to recover upon its fourth cause of action and that the defendant is entitled to its costs and disbursements upon said fourth cause of action.”

ASSIGNMENT OF ERROR NO. 16.

That the court erred in disallowing defendant’s proposed Conclusion of Law, as to plaintiff’s fifth cause of action, said proposed Conclusion of Law being as follows, to-wit:

“Based upon the court’s Findings of Fact, upon plaintiff’s fifth cause of action, the court concludes that plaintiff is not entitled to recover upon its fifth cause of action and that the defendant is entitled

to its costs and disbursements upon said fifth cause of action.”

ASSIGNMENT OF ERROR NO. 17.

That the court erred in disallowing defendant's proposed Conclusion of Law, as to plaintiff's sixth cause of action, said proposed Conclusion of Law being as follows, to-wit:

“Based upon the court's Findings of Fact upon plaintiff's sixth cause of action, the court concludes that plaintiff is not entitled to recover upon its sixth cause of action, and that the defendant is entitled to its costs and disbursements upon said sixth cause of action.”

ASSIGNMENT OF ERROR NO. 18.

That the court erred in disallowing defendant's proposed Conclusion of Law, as to plaintiff's seventh cause of action, said proposed Conclusion of Law being as follows, to-wit:

“Based upon the court's Findings of Fact upon plaintiff's seventh cause of action, the court concludes that plaintiff is not entitled to recover upon its seventh cause of action and that the defendant is entitled to its costs and disbursements upon said seventh cause of action.”

ASSIGNMENT OF ERROR NO. 19.

That the court erred in disallowing defendant's proposed Conclusion of Law, upon all of the causes of action set forth in plaintiff's complaint.

“And the court concludes that plaintiff is not entitled to recover in this action, for the reason that typhoid fever is not a bodily injury accidentally suffered and does not come within the purview of said policy of insurance.”

Portland, Oregon, August 12th, 1915.

SENN, ECKWALL & RECKEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 12th day of August, 1915.

JOHN A. LAING,
One of Attorneys for Plaintiff.

Filed August 12, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 12th day of August, 1915, there was duly filed in said court, and cause, a Bond on Writ of Error, in words and figures as follows, to-wit:

KNOW ALL MEN BY THESE PRESENTS, that we, the Aetna Life Insurance Company, a corporation of the State of Connecticut, as principal, and The Aetna Accident and Liability Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the Portland Gas & Coke Company, in the sum of seven thousand dollars, to be paid to the

said Portland Gas & Coke Company, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of August, 1915.

WHEREAS, the above named Aetna Life Insurance Company has applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to reverse the judgment rendered in the above entitled cause by the District Court of the United States for the District of Oregon.

NOW, THEREFORE, the condition of this obligation is such that if the said Aetna Life Insurance Company shall prosecute said writ to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

AETNA LIFE INSURANCE COMPANY,

By Paul C. Bates, Managing Agent.

THE AETNA ACCIDENT & LIABILITY COMPANY,

By Paul C. Bates, Its Resident Vice-President.

Attest: ALFRED L. LOMAX,
Its Resident Assistant Secretary.

THE AETNA ACCIDENT & LIABILITY COMPANY,

By McCargar, Bates & Lively, Its Local and General Agents.

By Paul C. Bates, Member of Firm.

(Seal, Aetna Accident and Liability Co.)

The within bond is hereby aproved this 12th day of August, 1915.

R. S. BEAN, Judge.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Undertaking is hereby accepted in Multnomah County, Oregon, this 12th day of August, 1915.

JOHN A. LAING,
One of the Attorneys for Plaintiff.

Filed August 12, 1915. G. H. Marsh, Clerk.

And Afterwards, to-wit, on Thursday, the 12th day of August, 1915, the same being the 34th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*In the District Court of the United Statse for the
District of Oregon.*

PORTLAND GAS & COKE COMPANY,

a Corporation,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY,

a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 12th day of August, 1915, came the above named defendant by F. S. Senn, its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error, intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 5th day of August, 1915, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may appear proper in the premises.

ON CONSIDERATION WHEREOF, the court does hereby allow the said writ of error and that citation issue as by law provided.

IT IS FURTHER ORDERED that the amount of the supersedeas bond to be given by said defend-

ant be and the same is hereby fixed at the sum of seven thousand dollars with good and sufficient surety to be approved by this court, which bond now being filed with the Aetna Accident and Liability Company as surety, is hereby approved and execution issued herein is recalled and stayed.

Dated August 12th, 1915.

R. S. BEAN, Judge.

Filed August 12, 1915. G. H. Marsh, Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT.

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record upon Writ of Error in the case of Portland Gas & Coke Company, a corporation, plaintiff, and defendant in error, against Aetna Life Insurance Company, a corporation, defendant, and plaintiff in error, in accordance with the law and the rules of Court, and that the said transcript is a true and correct transcript of the record and proceedings had in said Court as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$. for the fees of the clerk, and \$., cost of the printing of said record.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this. day of August, A. D., 1915.

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Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

AETNA LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,
a Corporation,

Defendant in Error.

Plaintiff in Error's Brief.

In Error to the District Court of the United States
for the District of Oregon.

SENN, EKWALL & RECKEN,
Attorneys for Plaintiff in Error.

JOHN A. LAING and H. W. STRONG,
Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

AETNA LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,
a Corporation,

Defendant in Error.

Plaintiff in Error's Brief.

STATEMENT OF FACTS.

The defendant in error was constructing a gas plant near the City of Portland, in Multnomah County, Oregon, and in doing this work employed a large number of men. The plaintiff in error issued to the defendant in error an indemnity policy, providing that the plaintiff in error "agrees to indemnify the defendant in error against loss and/or expense arising or resulting from claims upon the assured for damages on account of bodily and/or death accidentally suffered, or alleged to have been suffered by an employe or employes of assured." The assured in this case being the defendant in error.

During the construction work the defendant in error provided water for drinking purposes for its employes. This water was obtained from a nearby spring and also from the Government Moorings well. A number of employes contracted typhoid fever. These employes made claim against the defendant in error for damages, and several of them brought suit in the State courts of Oregon. Some of the cases were tried and others were settled. The employes alleged that the drinking water was contaminated with typhoid germs, and that the defendant in error was negligent in providing them contaminated water.

Plaintiff in error contended at the time the employes made claim, that the policy of insurance did not cover typhoid fever—that typhoid fever was not a bodily injury accidentally suffered, and refused to defend the claims of the employes. The defendant in error, at its expense, defended the suits of the employes and eventually settled the claims. The defendant in error, after adjusting the claims of the employes, brought suit in the United States District Court, for the District of Oregon, and secured judgment against the plaintiff in error for the amount paid the employes and for the expenses incurred in adjusting the claims and suits of its employes.

The complaint of the defendant in error sets forth a copy of the policy and alleges that the policy provides for reimbursement in cases of bodily injury.

accidentally suffered. The plaintiff in error filed a demurrer to this complaint on the ground that typhoid fever was not a bodily injury, accidentally suffered, and did not come within the purview of the policy. This demurrer was overruled. The case was tried by the Judge of the District Court of the United States, for the District of Oregon, sitting without a jury, the jury having been specifically waived by stipulation in writing. After hearing the testimony, and after the introduction of the policy of insurance, the District Court gave judgment in favor of the defendant in error, as prayed for in its complaint. The plaintiff in error excepted to the rendering of a judgment in favor of the defendant in error, and submitted to the District Court its proposed findings of fact and conclusions of law. These findings of fact and conclusions of law were rejected by the District Court, and an exception allowed, and the findings of fact and conclusions of law submitted by the defendant in error were allowed and a judgment rendered thereon.

The only question for solution in this appeal is whether or not typhoid fever constitutes a bodily injury, accidentally suffered. The District Court of the United States, for the District of Oregon, decided that typhoid fever contracted from drinking water was a bodily injury, accidentally suffered.

POINTS AND AUTHORITIES.

Bradbury's Workmen's Comp., Vol. 1, pages 339, 358.

Adams v. Acme White Lead & Color Works, 148 N. W. (Mich.) 485.

McCoy v. Michigan Screw Co., 147 N. W. (Mich.) 572.

Lickleider v. Iowa State Traveling Men's Assn., 151 N. W. (Iowa) 479.

Wright v. Order of Com. Trav., 174 S. W. (Mo.) 833.

Lehman v. Great Western Accident Assn., 133 N. W. 752.

Shanberg v. Fidelity & Casualty Co., 158 Fed. 1.

Bacon v. U. S. Mutual Accident Assn., 123 N. Y. 304.

Standard Life & Accident Insurance Co. v. McNulty, 157 Fed. 224.

Doser v. Fidelity & Casualty Co. of New York, 46 Fed. 446.

Smith v. Travelers' Ins. Co., 106 N. E. (Mass.) 607.

Appel v. Aetna Life Ins. Co., 83 N. Y. S. 238.

Elsey v. Fidelity & Casualty Co., of N.Y.
109 N.E. 413 [Advance Sheets.]

ARGUMENT.

The words "bodily injuries accidentally suffered" have a legal and technical meaning in the law of

insurance. "Bodily injury" is used in contradistinction to "bodily disease." "Accidentally suffered" is contradistinguished from an injury suffered through the natural course of events.

Bouvier defines an accident as an "event" which under the circumstances is unusual and unexpected by the person to whom it happens. In this case there was nothing accidental. The drinking of the water was a usual and natural matter. It was intentional—it was not unforeseen. The act itself must be accidental, and not the result or the consequence of the act. An unforeseen or unusual result from an intentional act is not an accident.

As was said by the Court in the case of *Shanberg v. Fidelity & Casualty Co.*, 158 Fed. 1:

"The disease from which the assured was suffering at the time of his death was not enumerated in the policy, and, as we view the case there was no accident in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is the rupture of the heart—an accident. That was the result, and not the means through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily and in an ordinary way with no unforeseen accidental or involuntary movement of the body whatever. There was no stumbling, slipping or falling; there was nothing accidental in his movements,

any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not purport to be a contract of indemnity against death or injury by all means."

One of the ablest and latest works on this subject, Bradbury's *Workmen's Compensation*, Volume 1, page 339, discusses the meaning of the word "accidental" at length, and on page 358 this authority used the following language:

"If a germ caused a bodily ailment without an abrasion of the skin, the general rule is that the result is a disease and not an accidental injury, within the meaning of an accident insurance policy. *Bacon v. U. S. Mutual Accident Assn.*, 123 N. Y. 304."

The English Act of 1897 was entitled:

"An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment."

The body of the act provided as follows:

"If in any employment, to which this act applies, personal injury by accident arising out of and in the course of employment, is caused to any workman, his employer shall be liable."

In the case of *Steel v. Gammell Laird Co., Ltd.*, (1905), 2 K. B. 232, it appears that a caulker in the employment of shipbuilders was seized with paraly-

sis, caused by lead poisoning, and became totally incapacitated as a result thereof. Lead poisoning may be caused by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. It was held in that case that lead poisoning could not be described as an "accident," in the popular and ordinary use of that word. This decision, and others of a like nature, caused the enacting power of Great Britain in 1906 to pass an amendment which was entitled as follows:

"An act to amend the law with respect to compensation to workmen for injuries suffered in the course of their employment."

Thus the word "accident" was eliminated so as to cover occupational diseases.

It will be noticed that the policy of insurance under consideration uses the words "bodily injuries, accidentally suffered."

In the case of *Hood & Sons v. Maryland Casualty Co.*, 206 Mass. 223, the Supreme Court of Massachusetts had under consideration a case where an employe contracted glanders while cleaning up stalls of horses infected with the disease. The Court held that that was a bodily injury, accidentally suffered. This cause, however, differs materially from the defendant in error's contention. The glanders is an infectious disease. No notice was given the employe that the horses had been afflicted with the disease. This was accidental. However, the drinking of water was natural and intentional, and the

bacilli in the water causing the typhoid fever was a mere result of an intentional act and not the result of an accident. If a bacilli should be thrown into a person's eye, and it became infected, this would be an accident; such an act is not intentional or usual, but it is accidental and extraordinary.

In the case of *Columbia Paper Stock Co. v. Fidelity & Casualty Co.*, 104 Mo. Appeal 157, a like state of facts as in the Massachusetts case was presented for consideration. An employe contracted kidney disease because of the handling of infected rags, and the Court held that this was an accident. However, typhoid fever caused by bacilli germs is not an accident. In no other way can the disease of typhoid fever be caused except by the bacilli. It is thus nothing unusual or extraordinary or unforeseen, but the poisoning of the body by infection with glanders or something of that nature is unusual and unforeseen. In the one case we have a well-understood disease; in the other we have an unusual occurrence, an unlooked-for event; the infection is the accident. On the other hand we have the natural drinking of water, which under no circumstances can be considered an accident.

As has been said by numerous authorities, a disease produced by a known cause is not a bodily injury accidentally suffered within the purview of an employer's policy, nor can typhoid fever be considered a bodily injury in the ordinary and usual acceptance of the term. Bodily injury, under an

insurance policy means some unusual unforeseen affliction; an infection of the skin or a bruise of the skin by coming in contact with an obstacle, but an injury to the body by means of a contracted disease, such as typhoid fever or tuberculosis cannot be considered a bodily injury in the ordinary sense. If typhoid fever, contracted from the drinking of water can be considered a bodily injury, accidentally suffered, then every known disease can be placed in the same category. An accident policy would then cover every disease. Insurance policies of this nature have a definite and well-established meaning. It was never intended that a policy of this nature should include a disease. It would place upon the insurance company a liability and a loss never contemplated. An insurance policy being a contract, the intention of the parties should receive consideration.

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Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AETNA LIFE INSURANCE COMPANY
a Corporation
PLAINTIFF IN ERROR

VS.

PORTLAND GAS & COKE COMPANY
a Corporation
DEFENDANT IN ERROR

Defendant in Error's Brief

In Error to the District Court of the United States
For the District of Oregon

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Filed

H. D. Mackton,

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AETNA LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,
a Corporation,

Defendant in Error.

No. 2646

Defendant in Error's Brief

STATEMENT OF FACTS

This action was brought by Defendant in Error, to whom we shall hereafter refer as the Gas Company, to obtain indemnity under a policy of indemnity insurance from Plaintiff in Error, hereafter referred to as the Insurance Company, on account of certain expenses the Gas Company had been forced to incur in defending the claims against it of a number of its employees who had been engaged in the construction of the Gas Company's new plant adjoining Government Moorings near the City of Portland, Oregon. The complaint contains seven causes of action dealing respectively with the claims of seven of such employees. The statements of the

expenses incurred by the Gas Company in defending these claims as set forth in the original complaint are not questioned or disputed by the Insurance Company, nor is any question raised as to the right of the Gas Company to effect the settlements that were made. The contention of the Insurance Company is that the expenses of these claims are not such as the Insurance Company agreed to indemnify the Gas Company against under the "CONTRACTORS EMPLOYERS LIABILITY POLICY" upon which the action is based.

A copy of this policy is set forth in the Transcript of Record herein, pages 163 to 179 inclusive. For convenience of reference we set forth below a verbatim copy of the insuring clause of the policy with its title, viz.:

"Policy No. E-91221.

AETNA LIFE INSURANCE COMPANY,

Accident and Liability Department.

CONTRACTORS EMPLOYERS LIABILITY POLICY.

In consideration of the premium herein provided, the Aetna Life Insurance Company of Hartford, Connecticut (called the Company),

Does Hereby Agree to Indemnify

INSURING CLAUSE.

the Assured described in the Warranties hereof, within the amounts as expressed herein, Against Loss and/or Expense Arising or Resulting from Claims Upon the Assured for Damages on account of bodily injuries and/or death accidentally suf-

ferred, or alleged to have been suffered, by an employee or employees of the Assured as provided in said Warranties, by reason of the business as described and conducted at the locations named therein, whether said injuries and/or death are accidentally suffered, or alleged to have been suffered, at the locations named or elsewhere, save and except claims arising by reason of:" (Exceptions not material herein.)

The policy contains no conditions, stipulations or exceptions, material herein, limiting the scope of the indemnifying covenant.

The nature of the injuries alleged to have been sustained by the employees who presented claims against the Gas Company is set forth in the various causes of action in the original complaint. In the case of Louis Weich the claim was that "he endured great pain, suffering and mental anguish and his mental system was permanently shattered and he was seriously and permanently injured in that his heart was inflamed and the valves and muscles thereof were wholly and permanently incapacitated from performing their normal functions and the lower limbs of Weich were benumbed and paralyzed." (Transcript of Record, page 8.)

In the case of I. M. Andrus, set forth in the seventh cause of action, the claim was that "he suffered paralysis of certain muscles of his arms and legs and that he had toe drop in his left foot and an incomplete wrist drop in his right hand and was numb to pin prick over part of the back of his right

hand and forearm and over the front of his left leg and ankle and that he was permanently injured and incapacitated from performing any work whatsoever." (Transcript of Record, page 27.)

The claims of the other employees were all for substantial and permanent impairment of their physical health and strength and bodily functions, as will appear from an examination of the various causes of action in the complaint. (Transcript of Record, pages 4-31.)

All of these injuries were alleged to have been incurred by reason of contracting typhoid fever while engaged in the business conducted by the Gas Company at Government Moorings and to have been due to the negligence of the Gas Company in furnishing these men with impure water in connection with that business. The Insurance Company does not claim that the Gas Company knew that the water contained typhoid germs or was likely to produce injuries or that the employees who claim to have been injured as a result of drinking this water knew that the water was liable to produce injurious results.

The question for this Court to decide, therefore, is whether or not the District Court erred in holding that the loss and expense incurred by the Gas Company arose and resulted from "Claims upon the Assured for Damages on account of bodily injuries * * * accidentally suffered, or alleged to have been suffered, by * * * employees of the Assured

* * * by reason of the business as described and conducted'' * * * by the Gas Company, the Defendant in Error.

POINTS

**The Expenses Incurred by Defendant in Error
Were Within the Scope of Its Indemnity Policy
With Plaintiff in Error and the Judgment of
the District Court Should Be Affirmed.**

AUTHORITIES

New Standard Dictionary (1913), definitions.
Webster's New International Dictionary
(1911), definitions.

Fuller's Accident and Employers' Liability
Insurance, (1913) 445.

Brintons, Limited v. Turvey, 1905 Appeal
Cases 230, (House of Lords and Privy
Council).

Western Commercial Travelers Ass'n v.
Smith, 85 Fed. 401 (C. C. A., 8th Circuit).

United States Mutual Accident Ass'n v.
Barry, 131 U. S. 100.

Columbia Paper Stock Co. v. Fidelity &
Casualty Co., 78 S. W. 320; 104 Mo. App.
157.

H. B. Hood & Sons (Inc.) v. Maryland
Casualty Co., 206 Mass. 223; 92 N. E. 329.

Fenton v. Fidelity & Casualty Co., 36 Ore.
283; 48 L. R. A. 770.

Tillamook Lumbering Co. et al., v. Liverpool
 & London & Globe Ins. Co., 175 Fed. 508
 (Dist. Ct. Dist. of Oregon) affirmed 178
 Fed. 161 (C. C. A. 9th Circuit). *red.*
 Railway Mail Ass'n v. Dent, 213 ~~U. S.~~ 981
 (C. C. A. 8th Circuit).

ARGUMENT

The policy sued upon is entitled "CONTRACTORS EMPLOYERS LIABILITY POLICY." It is a contract made between the Insurance Company and the Gas Company for the purpose of protecting the Gas Company in consideration of the payment of certain percentages of its payrolls against the expense of defending claims of its employes growing out of the work which they were employed to do. It is not a policy of "accident insurance." It is even more than insurance against liability. It is a broad, comprehensive contract to protect and indemnify the Gas Company against all loss or expense arising from claims upon the Gas Company for damages by its employes on account of bodily injuries accidentally suffered by reason of the business carried on by the Gas Company. It contains no limitations or exceptions in regard to the kind, nature or cause of the bodily injuries suffered or alleged to have been suffered out of which such claims against the Gas Company might arise, other than such limitation as may be signified by the use of the term "accidentally suffered."

It is stated in Plaintiff in Error's brief (page 9) :

“It was never intended that a policy of this nature should include a disease. It would place upon the Insurance Company a liability and a loss never contemplated. An insurance policy being a contract, the intention of the parties should receive consideration.”

The first sentence above quoted is a mere arbitrary statement unsupported by evidence or authority. The authorities herein cited and hereinafter referred to definitely negative this fundamental assumption of Plaintiff in Error's argument. If the statement is made on the basis of supposed everyday practical experience a mere consideration of the question from this standpoint reveals the error of the statement. Blood poisoning is a disease, yet we presume it would not be disputed by the Insurance Company, in the absence of any stipulation in its policy to the contrary, that its policy covered the claim of an employe who suffered from blood poisoning as the result of some alleged negligent act of his employer. Pneumonia is a disease, yet we do not believe that it would be argued seriously that the claim of an employe who had suffered from pneumonia as the result of inhaling poisonous fumes, alleged to have been negligently introduced into the air breathed by the employe, was not covered by such a policy. The injurious effects upon the system of poison ivy are unquestionably the results of a disease, yet it has been held by the courts that

such injurious effects, as well as those of other recognized diseases, are within the scope of accident insurance policies where not clearly stipulated against by the terms of the policy. (See *Columbia Paper S. Co. v. Fid. & Cas. Co.*, 78 S. W. 320, *Railway Mail Ass'n v. Dent*, 213 Fed. 981, and cases therein cited.)

The "intention of the parties" to this contract, as this appears from the title and insuring clause of the policy, was, on the part of the Insurance Company to indemnify, and on the part of the Gas Company to be indemnified against, the expense of claims of the Gas Company's employes for bodily injuries accidentally suffered in the course of their employment. It was the intention of both parties to make a broad indemnity contract, embracing all claims of the character mentioned that might be made against the Gas Company by its employes; not a contract emasculated into empty phrases by provisos, conditions and exceptions. Nor is it the function of the court to engraft such exceptions upon the policy upon the supposition that the Insurance Company would have made the exception in the policy if the occurrence of the particular bodily injuries had been foreseen. The intention of the contract received consideration and was made effective by the judgment of the District Court. No other result is possible under a common-sense construction of the contract.

In interpreting the expression "bodily injuries accidentally suffered" as used in this policy it is proper at the outset to consult the definitions of the component words as they appear in lexicons or dictionaries of recognized authority. A critical examination of these terms as defined by such authorities discloses the error in the premise assumed by Plaintiff in Error in the opening paragraph of its brief.

Webster's New International Dictionary (1911) defines "bodily" as "of or pertaining to the body, in distinction from the mind." The New Standard Dictionary (1913) defines "bodily" as "of or pertaining to the body; corporeal." Webster defines "injury" as "a damage or hurt done to or suffered by a person or thing; detriment to or violation of, person, character, feelings, rights" etc. The Standard defines "injury" as "any wrong, damage or mischief done or suffered." No authority has been cited or can be found for the statement in Plaintiff in Error's brief that "'bodily injury' is used in contradistinction to 'bodily disease.'"

"Accidentally" is defined by Webster as "in an accidental manner; unexpectedly; by chance; unintentionally." An "accident" is defined as "an event that takes place without one's foresight or expectation." The Standard defines "accidentally" as "in an accidental manner, as by accident or chance; unintentionally; casually"; an "accident," as "anything that happens; especially anything occurring unexpectedly; any unpleasant or unfortunate occurrence that causes injury, loss, suffering or

death." Plaintiff in Error's brief, page 5, cites Bouvier as defining an "accident" as an event "which under the circumstances is unusual and unexpected by the person to whom it happens."

There can be no serious contention in this case but that the claims of injuries made against the Gas Company were claims of bodily injuries. Nor can it be contended, following the definition of Bouvier approved by Plaintiff in Error, that these injuries did not constitute an event which under the circumstances was unusual and was unexpected by the person to whom it happened. No employe expected to suffer typhoid fever and its resulting injuries from drinking water furnished him by the Gas Company. The event or injury was to each employe so afflicted entirely unintentional, unexpected and unusual, and was not such as could reasonably have been contemplated by him when he drank the water. Nor was the event the natural and probable consequence of the act of drinking the water, the consequence which ordinarily follows, or which could reasonably be anticipated. The facts as admitted on this appeal demonstrate, on the very authority relied upon by Plaintiff in Error in its brief, that the injuries and damages sustained were accidentally suffered within the meaning of the policy. An examination of the cases relied upon by Plaintiff in Error and of the authorities cited herein confirms this conclusion.

Plaintiff in Error at page 4 of its brief has cited a number of authorities in supposed support of its

position before this Court. With the exception of the two Michigan cases which arose under the Michigan Compensation Act, the cases cited deal entirely with the interpretation of policies of accident insurance in the ordinary sense of that term. In each of these cases a recovery upon the policy was denied for a bodily affliction that might be denominated as a disease, *but in each instance the recovery sought was expressly precluded by clear and specific stipulations and exceptions contained in the policy involved.* In each of the cases, except the two Michigan cases and the case in 157 Federal, the policy provided that the injuries or death must result from "external, violent and accidental means." In the Bacon, Dozier and Lickleider cases the policies contained further stipulations expressly excepting injuries resulting from disease or bodily infirmities. In the Shanberg case certain illnesses specifically mentioned in the policy were covered and all others excluded. In the case of the Standard etc. Ins. Co. v. McNulty the policy excluded injuries sustained while attempting to enter or leave any moving conveyance and the court held that *fatal* injuries incurred while attempting to enter a moving conveyance were included within the exception specified in the policy.

The quotation from the Shanberg case appearing on page 5 of Plaintiff in Error's brief is incomplete in that it omits the opening sentence of the paragraph from which the quotation is taken and the

sentence immediately following the quotation. These sentences indicate the real basis for the decision and are necessary to a proper understanding thereof, viz.:

“The policy is one of indemnity against disability or death resulting directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, and also against disability from certain illnesses therein specified.”

* * * * *

“The cause of death must in all cases where it is sought to recover under the provisions above quoted result directly and independently of all other causes from bodily injury sustained through external, violent and accidental means, or the event is without the scope of the contract.”

Manifestly these cases can have no application to the case at bar except as they clearly indicate that the recovery would have been allowed but for the presence in the policy of the express stipulations which precluded the recovery. This distinction is clearly pointed out in the *Columbia Paper Stock Co.* case, 78 S. W. 320, and the case of *Hood & Sons*, 206 Mass. 223, hereafter referred to.

In the case of *McCoy v. Michigan Screw Company*, 147 N. W. 572, arising under the Michigan Compensation Act, the claim was based upon a

gonorrheal infection of the eye as to which the court held there was no evidence from which it could be legitimately considered that the injury arose in the course of the man's employment.

In the Adams case, 148 N. W. 485, also a case involving a construction of the Michigan Compensation Act, the court held that an occupational disease arising slowly and gradually from the exposure of the employe to a known poisonous agent was not a "personal injury due to accident" within the limited scope of the Act. The court considered the purpose of the Act, the limitations of its title and various other sections of the Act in reaching its conclusion. The case is clearly distinguishable from the case at bar. Occupational diseases such as these grow out of intentional and continued contact with and exposure to a distinct and known disease-producing cause. The probable result of such continued exposure or contact is known in advance to the workman and his employe; i. e., that injury or even death will ensue if the condition is continued sufficiently long. It is not unusual, unexpected or unforeseen, but on the contrary, is the natural and probable consequence of the conduct of employer and employe and an event that can properly be said to have been contemplated by the employe and his employer in such occupation. The case bears no analogy to the unusual, unforeseen and un contemplated result or event on which the claims of injuries under consideration in the case at bar were founded.

As we have previously pointed out, the policy

under consideration is very much broader than a policy of accident insurance. It indemnifies against *claims* on account of "bodily injuries accidentally suffered, *or alleged to have been suffered.*" It is to be noted that the qualifying word "accidentally" is omitted with respect to injuries "alleged to have been suffered." A strict construction of the policy would require the Insurance Company to protect the Gas Company against claims of bodily injuries "alleged to have been suffered" without any qualification whatever. Assuming for the purposes of the argument, however, that the qualification "accidentally" be read into the phrase "alleged to have been suffered" an examination of the decisions of the appellate courts of the United States and England discloses an entirely different interpretation of the words "accident" and "accidental" from that set forth in Plaintiff in Error's brief. In the two cases from the United States Courts cited below the courts were dealing with the interpretation of the expression "accidental means," an expression which may very well have a much more limited significance than the expression "accidentally suffered" used in the policy under consideration.

Western Commercial Travelers Ass'n v.
Smith, Circuit Court of Appeals, 8th Cir-
cuit, 85 Fed. 401.

In this case the insured met his death by blood poisoning resulting from an abrasion of the skin of one of his toes due to wearing a new shoe. The policy

by its terms was limited to "bodily injuries effected by external, violent and accidental means." The court in an opinion by Judge Sanborn, after reviewing the authorities, among them some of the cases cited by the Insurance Company in this case, held that the bodily injury sustained was not only produced by external and violent but also by accidental means. It disposes of the contention that the injury was not accidental in language which is directly applicable to the case at bar:

"The contention is that it was not accidental
 * * *. An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means.

"Was the abrasion of the skin of the toe of the deceased the natural and probable consequence of wearing new shoes? It must be conceded that new shoes are not ordinarily worn

with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly, and without any design on his part to cause it. * * * Nor can such an abrasion be said to be the natural consequence of wearing such shoes,—the consequence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means,—means not designed or calculated to produce it?” (Pp. 405-406.)

The opinion cites with approval the definition of an “accident” in *Insurance Company v. Burroughs*, 69 Pa. St. 43, at page 51 as

“An event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore unexpected; chance; casual; contingency.”

In *United States Mutual Accident Association v. Barry*, 131 U. S. 100, the deceased met his death due to a stricture of the duodenum which it was claimed had resulted from his jumping from a platform to the ground. Two of his companions had jumped from the same platform at the same time and place and alighted safely. The jumping itself was intentional. The case was tried before the Circuit Court and a jury and resulted in a verdict in favor of the

widow of the insured, and the judgment of the lower court was affirmed by the Supreme Court of the United States. It was urged on the appeal that there was no evidence to support the verdict because no accident was shown. On this phase of the question Mr. Justice Blatchford, who wrote the opinion, said as follows (page 121) :

“We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term ‘accidental’ was used in the policy in its ordinary, popular sense, as meaning ‘happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected’; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the

injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

In the following case from the House of Lords the premises assumed in Plaintiff in Error's brief as the basis of its argument and the same objections as are now presented are considered and disposed of by the court in the opinions of the various judges quoted below.

Brintons, Limited v. Turvey, House of Lords
and Privy Council, 1905 Appeal Cases 230.

This case arose under a proceeding brought under the Workmen's Compensation Act of 1897, to obtain compensation for the widow of an employe of the appellants who had become infected with anthrax while engaged in sorting wool in the appellants' factory, and who died from such disease. The Compensation Act at that time provided for the awarding of compensation for death or injuries "by accident."

The County Court Judge awarded compensation to the widow, saying as follows (page 230):

"I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it

could multiply and grow and so cause a malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, in this case the foreign substance is microscopic. I think it immaterial whether there was in fact any external pimple or abrasion because if there was, it was a fortuitous accident that the bacillus alighted on that particular spot. But I find in fact that there was no such abrasion or pimple. *My judgment is based on the fact that there was in this case a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death."*

This decision was affirmed by the Court of Appeal and was appealed from that court to the House of Lords and Privy Council. The report contains, at page 231, a summary of the argument of the appellants against allowing the compensation. Their *argument* is similar to that of Plaintiff in Error here, as appears from the extracts quoted below:

"There must be two things: A personal injury and an accident. The plain natural meaning of 'accident' must be taken. There must be some occurrence which would be popularly described as an accident, some force applied to the

body: e. g., a pin prick, scratch, contact with sharp tool, bruise, wound, or the like. Sunstroke is not an accident within a policy against 'personal injury arising from accident' * * * because sunstroke arises from natural causes. So it is with anthrax, or any infectious or contagious disease. If there had been an abrasion by accident and the bacillus entered through the abrasion, the result would be different. If this case is within the meaning of the Act, then all cases of disease are."

After referring to certain other decisions and certain portions of the Act dealing with the question of notice, etc., the *argument* continues:

"That seems to imply that an injury by anthrax is not an injury by accident. But if it is, then the other cases referred to in s. 73, lead, phosphorus, arsenical or mercurial poisoning, are also injuries by accident. An accident is one thing; an accidentally contracted disease is another."

The House of Lords sustained the ruling of the County Judge and the Court of Appeal in holding the widow entitled to compensation. We quote from the opinions of the judges as follows:

"Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident. The smallest particle of dust swept by a

storm is where it is by the operation of physical causes, which if you knew beforehand you could predict with absolute certainty that it would alight where it did. But when the Act now under construction enacted that if in any employment to which the Act applied personal injury by accident arising out of and in the course of his employment is caused to a workman his employers shall pay compensation, I think it meant that, apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was an accident causing damage. I do not stop to discuss the provisions which disentitle a sufferer, because they are not relevant to the question now under debate.

“I so far agree with my noble and learned friend that I think, in popular phraseology from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; *but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase accident causing injury, because the injury inflicted by accident sets up a condition of things which medical men describe as disease.*

“Suppose in this case a tack or some poisoned substance had cut the skin and set up

tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage?" * * *

"Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets erysipelas—a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act because immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which when shewn we call a disease? I cannot think so."

By Earl of Halsbury L. C. pp. 233-4.

[Lord Halsbury's exclusion of idiopathic diseases would not exclude typhoid fever which is produced by an external foreign substance, viz., the bacillus typhosus. Idiopathy or "idiopathic disease" is defined as "a morbid state of spontaneous origin" by Borland's Medical Dictionary. It has also been defined as a disease "arising within the individual from no extrinsic or external cause."]

"My Lords, on the facts found by the learned county court judge I am of the opinion that the decision of the Court of Appeal was right. It is plain, I think, that the mischief which befell the workman in the present case was due to acci-

dent, or rather, I should say, to a chapter of accidents.

“It was an accident that the noxious thing that settled on the man’s face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man’s system, for the judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible. The result was anthrax, and the end came very speedily.

“Speaking for myself, I cannot doubt that the man’s death was attributable to personal injury by accident arising out of, and in the course of, his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate.”

By Lord Macnaghten, pp. 234-5.

“In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of disease does not render the cause not an accident.”

By Lord Lindley, p. 238.

As the court well says in the case of *Railway Mail Association v. Dent*, 213 Fed. 981, at page 983:

“So many and varied are the causes of accidental injury that the particular language employed in instruments of insurance is of the greatest importance. A word added or omitted may alter materially the scope of the indemnity. Many cases like the one at bar lie close to the border line perhaps, because not definitely in mind for inclusion or exclusion, but it is a delicate thing for a court to adopt the latter course merely upon a supposition that they would have been excluded in terms had they been thought of. The insurer most familiar with the subject chooses the words of his undertaking, and it is not unjust to take them in the sense conveyed to the ordinary reader, nor to hold against him in case of real substantial doubt.”

The cases cited as authority for its position by Plaintiff in Error and the cases heretofore referred

to are cases dealing with policies of accident insurance or cases in which the court was called upon to determine the meaning of the expressions "accident" or "accidental means" under policies or statutes in which these expressions were used. None of these cases deals with policies of indemnity insurance protecting employers against claims of "bodily injuries accidentally suffered or alleged to have been suffered" which are of a much more inclusive nature than the ordinary policy of accident insurance. The courts however have been called upon to construe policies of indemnity insurance similar to the policy under consideration and the rulings upon these policies, which are directly in point, fully sustain the ruling of the District Court in this action.

As the facts and the questions raised in the two following cases are so substantially identical with the case at bar the facts and opinions are set forth somewhat fully below. These cases dispose of every question raised and every argument made by Plaintiff in Error in its brief.

In *Columbia Paper Stock Company v. Fidelity & Casualty Company*, 78 S. W. 320, Missouri Court of Appeals, an action was brought by the Paper Company for reimbursement under a so-called "employers' liability" insurance policy for the expenses incurred in defending a suit of one of its employees. This employee had sued and recovered judgment against the Paper Company for a bodily injury sustained by contracting acute kidney disease or

dropsy engendered by absorbing poison from handling infected rags or paper in the course of her employment. Under the policy of insurance the Insurance Company agreed to indemnify the Paper Company "against loss from common law or statutory liability *on account of bodily injuries, fatal or non-fatal, accidentally suffered* within the period of this policy by any person or persons while within the premises hereinafter mentioned." The court of appeals affirmed a judgment in favor of the Paper Company against the Insurance Company upon the policy, holding that the injuries sustained by the employe from contracting kidney disease in the course of her employment were bodily injuries accidentally suffered within the meaning of the policy. We quote from the opinion as follows, page 323:

"Appellant further puts forward the contention that a disease produced by a known cause cannot be accidental, and therefore such a disease as acute kidney disease or dropsy produced by the absorption of poison, consequent on handling infected paper or rags in the course of employment, is not covered by the policy; and the legal question is thus sharply presented whether the injuries consequent on such illness resulted from a cause against which the insurance was issued. In the construction of such contracts, it is well established that not only should they be given a fair and reasonable construction, so as to give effect to the objects

intended by the parties thereto, but any obscurity in the language employed in the contract is to be resolved against the insurer, and to receive a broad and liberal interpretation in favor of the assured. Again borrowing from the eminent authority on the law of insurance, above referred to: 'No rule in the interpretation of a policy is more fully established or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted. 1. May, Insurance (4th Ed), Secs. 174, 175. This doctrine has obtained recognition and application in the recent decision by the Supreme Court of Missouri already adverted to (*Dezell v. Casualty Co.*, *supra*), wherein it was in substance, held that a policy insuring against bodily injuries sustained through external, violent and accidental means, but in terms not covering injuries, fatal or otherwise, resulting from poison, or anything accidentally taken, administered, absorbed, or inhaled, did not bar recovery for unintentional death resulting from medicine, though containing poison administered, bona fide to alleviate physical suffering.'" * * *

(P. 324): "An extensive array of decisions in England, as well as in America, submitted by respondent, tend to negative the proposition laboriously sought to be sustained by appellant—that a disease superinduced by a recognized cause is not to be considered accidental." * * * Citing a long list of American and English decisions in support of the principle stated.

"Appellant has invoked and appealed to several cases as upholding the doctrine contended for—that a disease produced by a known cause cannot be a bodily injury accidentally suffered, and therefore in conflict with the foregoing authorities." * * * The opinion then proceeds to distinguish these cases, among them some cited in Plaintiff in Error's brief, on the ground of the particular stipulations and exceptions in the policies, and proceeds (page 325):

"In so far as these latter cases are opposed to the rulings hereinabove relied on, we must dissent from such conclusions, and adhere to what we deem the sounder reasoning and weight of authority. If, for example, in lieu of producing the more gradual and protracted infirmities of acute kidney disease or dropsical affection, the infected material submitted to defendant's workwoman had emitted poisonous gases or fumes, producing her instantaneous death, or resulting in immediate and violent convulsions, under numberless authorities the occurrence would, in legal contemplation, and

within the interpretation of policies insuring against accidents, be confidently pronounced accidental, yet such consequences would be disease produced by known causes.

“In conclusion, after full consideration, upon a fair and legal construction of the terms of this policy, which were for indemnity against loss from common-law or statutory liability for damages on account of bodily injuries, fatal, or non-fatal, accidentally suffered, the injury sustained by respondent’s employe upon its premises in handling the infected rags and wall paper fell fairly within the true meaning and intent. The judgment below was rendered for the right party, and is affirmed.”

H. B. Hood & Sons (Inc.) v. Maryland Casualty Company, 206 Mass. 223, 92 N. E. 329 (1910).

In this case the Maryland Casualty Company had issued to the plaintiff corporation, H. B. Hood & Sons, a policy insuring it

“against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employe * * *.”

While the policy was in force one Barry, an employe of the plaintiff, had the care of horses which were afterward found to have been suffering from glanders, and Barry was directed to assist in cleaning up the stalls. Barry was subse-

quently attacked by glanders and brought suit against the plaintiff for negligently exposing him to the disease. He obtained judgment for \$1512, which Hood & Sons paid. An action was brought against Maryland Casualty Company to recover this sum and its disbursements in connection with the defense of the suit. The lower court found a judgment for the plaintiff for \$2474.68, and this judgment was sustained on appeal.

The Supreme Court, in its opinion, pp. 224-226, says:

“The policy is entitled, ‘Manufacturers Employers Liability Policy.’ The contract which it contains is one of indemnity in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employes for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employes have accidentally received bodily injuries for which they are liable. * * * It is to be noted that the policy does not contain the words ‘violent and external’ in addition to the word ‘accidental,’ as is the case in many if not most accident policies. The insurance is liability insurance so called, and not insurance

against accidents. The liability insured against is that 'imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employee.' Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability insured against may arise. The fact that the accident may have been occasioned through negligence on the part of the insured is, therefore, immaterial. * * *

"The question then is whether the amount which the plaintiff was compelled to pay Barry was paid 'for damages on account of bodily injuries accidentally suffered' by him within the meaning of the policy. It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed, it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been. * * *

"Was the injury brought about accidentally within the fair scope and meaning of the policy, or was it the result of disease contracted while in the employ of the plaintiff but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident

that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease. * * * If the disease was the result of an accident then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come within the terms of the policy. The language is 'bodily injuries accidentally suffered.' It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated perhaps with physical force of some sort, but in the absence of anything in the policy limiting it to that we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease and thereby causes him great and perhaps lasting physical injury would seem to be as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force. As was said by Lord Halsbury in *Brintons v. Turvey*, (195) A. C. 230, 233, the anthrax case, 'when some affection of our physical frame is in any way induced by an accident, we must be on our guard that

we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease.'

"The construction which we are inclined to give to the policy accords with the great weight of authority in similar cases, and rests, we think, on sound principles."

The opinion cites a number of American and English cases, among them the case of *Columbia Paper Stock Company v. Fidelity & Casualty Company*, supra, and distinguishes the decision in the case of *Bacon v. United States Mutual Accident Association*, 123 N. Y. 304, cited in Plaintiff in Error's brief, upon the ground of the peculiar stipulations and exceptions contained in the form of certificate or policy sued upon in that case.

These two cases conclusively sustain the District Court's decision in the case at bar. They dispose of every objection and argument made by the Plaintiff in Error to defeat the indemnity contracted for by the Defendant in Error under the policy of insurance. None of these cases bases its reasoning or conclusion upon the proposition asserted by Plaintiff in Error that there must be an abrasion of the skin or a bruise or some other external indication of the injury. Both of these cases, as well as the case in the House of Lords clearly negative the contention that any such external injury or indication of

an injury is essential to recovery. The cases rest squarely upon the principle that injuries sustained in the body of the employe without the intent or fore-knowledge of employer or employe are bodily injuries accidentally suffered, whether or not the nature of the injury might also be denominated by medical men as a disease.

In a recent work, Fuller "Accident and Employers' Liability Insurance" (1913), page 445, the author discusses these indemnity policies as follows:

"Nor is liability under these policies of employers' indemnity insurance confined to those cases alone where the assured is forced to pay damages to employes because of accident in the strictly literal sense of that term. They will also cover cases where an employe has contracted a disease under conditions such as to render the employer liable for negligence."

The rule applicable to the construction of insurance contracts is well stated by Mr. Justice Bean, now Judge of the District Court, in the case of *Fenton v. Fidelity & Casualty Company*, 36 Ore. 283, 48 L. R. A. 770, as follows:

"If, however, the meaning of the policy is in doubt, and its language is fairly and reasonably susceptible of two constructions,—one favorable to the assured, and the other to the

defendant,—the one is to be adopted which is the most favorable to the assured. This is the universal ruling in the construction of insurance policies, because they are drawn by the attorneys, officers, and agents of the company; and it is but fair that, if there should be any ambiguity or uncertainty in the language used, it should be construed most strongly against the company: *American Sur. Co. v. Pauly*, 170 U. S. 133; *Utter v. Traveler's Ins. Co.*, 65 Mich. 545; *Grand Rapids Elec. Light Co. v. Fidelity & Cas. Co.*, 111 Mich. 148."

The ruling in the Fenton case was cited with approval and followed by the U. S. Circuit Court for the District of Oregon in *Tillamook Lumbering Co. et al., v. Liverpool & London & Globe Ins. Co.*, 175 Federal 508, in an opinion by Judge Wolverton, from which we quote as follows:

"The construction more favorable to the insured is adopted, because of the usual custom of the insurance companies in propounding their own forms of policies and contracts; the insured being obliged to take what the company offers, notwithstanding the writing, as a rule, is accompanied with much prolixity and detail of stipulation, covenant, and warrant."

This judgment was affirmed by the Circuit Court of Appeals for this Circuit in *Liverpool & London & Globe Ins. Co. v. Tillamook Lumbering Company et al.*, 178 Federal 161.

CONCLUSION

We submit therefore that on a common sense and fair interpretation of this policy and on the authorities herein referred to Defendant in Error is entitled to the indemnity it contracted for from the Plaintiff in Error against the expenses arising out of these claims against it by its employes. The very authorities relied upon by the Plaintiff in Error indicate most clearly the ability of insurance companies in writing these contracts to limit their application by stipulation, condition, proviso and exception to particular classes of bodily injuries or to particular causes of injuries when such limitation is within the minds of the contracting parties. It is a matter of common experience, as pointed out by Judge Wolverton in the Tillamook case, that insurance companies *do* make such stipulations with "much prolixity and detail" if the party assured is willing to purchase a policy of that nature. The assured in this case did not buy such a policy but on the contrary contracted for a policy that would fully protect it against the claims of its employes growing out of their employment. The policy is without exception or proviso limiting the broad scope of the indemnity agreement, and no such exception or pro-

viso may be read into this policy now that the event against which the policy was purchased has occurred.

Respectfully submitted,

JOHN A. LAING and H. W. STRONG,
Attorneys for Defendant in Error.

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Portland, Oregon.

United States
Circuit Court of Appeals

For the Ninth Circuit.

LOUIS BUTTNER,

Appellant,

vs.

MARY A. ADAMS, ALLEN SHIPPING COMPANY, LEON BLUM,
C. W. BRANDT, BYXBEE & CLARK COMPANY, J. M.
COLMAN, HAVISIDE, WITHERS & DAVIS, E. HENRIX,
D. B. HINCKLEY, EXCELSIOR INVESTMENT COMPANY,
RUSS MILL AND LUMBER COMPANY, LAURA M. HUN-
TOON, C. A. HOOPER & COMPANY, S. G. JOHNSON, H. C.
JENSEN, T. J. JORGENSEN, E. KALLENBERG, E. H.
KITREDGE, C. A. KLINKENBERG, OTTO LINDHOLM,
ANNA MAAS, MARINE INVESTMENT COMPANY, C. F.
MICHAELS, THE CHARLES NELSON COMPANY, A. A.
BAXTER, A. E. COOLEY, S. C. DENSON, L. SEGELHORST,
JAMES TYSON, CLARA PETERSON, F. B. PETERSON,
OTTO PETERSON, F. L. PRITCHARD, D. ROTH, Z. RUSS
& SONS COMPANY, AUSTIN SPERRY, H. B. SPERRY,
KATE E. SPIERS, F. W. VOOGT, FRANCES J. WILSON,
MABEL LOIS HODGE, THOMAS CARROLL HODGE,
STELLA H. WAYMAN, FLORENCE E. WILLIAMS and
AMELIA WETZEL YSCHUDI,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
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Filed

FEB 10 1910

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*In the District Court of the United States in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15, 720.

LOUIS BUTTNER,

Libelant,

vs.

MARY A. ADAMS ALLEN SHIPPING COMPANY, LEON BLUM, C. W. BRANDT, BYXBEE & CLARK COMPANY, J. M. COLMAN, HAVISIDE WITHERS & DAVIS, E. HENDRIX, D. B. HINCKLEY, EXCELSIOR INVESTMENT COMPANY, RUSS MILL and LUMBER COMPANY, LAURA M. HUNTOON, C. A. HOOPER & COMPANY, S. G. JONHSON, H. C. JENSEN, T. J. JORGENSEN, E. KALLEBERG, E. H. KITTREDGE, C. A. KLINKENBERG, OTTO LINDHOLM, ANNA MAAS, MARINE INVESTMENT COMPANY, C. F. MICHAELS, THE CHARLES NELSON COMPANY, A. A. BAXTER, A. E. COOLEY, S. C. DENSON, L. SIEGELHORST, JAMES TYSON, CLARA PETERSON, F. B. PETERSON, OTTO PETERSON, F. L. PRITCHARD, D. ROTH, Z. RUSS & SONS COMPANY, AUSTIN SPERRY, H. B. SPERRY, KATE E. SPIERS, F. W. VOOGT, FRANCES J. WILSON, MABEL LOIS HODGE,

THOMAS CARROLL HODGE, STELLA H.
WAYMAN, FLORENCE E. WILLIAMS,
and AMELIA WETZEL YSCHUDI,

Respondents.

(Amended Libel.)

To the Honorable M. T. DOOLING, Judge of the
Above-entitled Court.

The libel of Louis Buttner of said district, formerly a seaman, now without permanent occupation by reason of the injuries hereinafter complained of, amended by leave of the Court first had and obtained, against the respondents above named all of said district, merchants and ship owners, in a cause of damages, civil and maritime, alleges as follows:

I.

That during the whole of the month of January, 1913, Pacific Shipping Company, was, ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business [11*] in the city and county of San Francisco, said State, during said month of January, 1913, it was the owner and operator of a certain merchant sailing vessel flying the American flag, and having its home port, in the port of San Francisco, State of California, and known, named and called the "Americana."

II.

That under and by virtue of the laws of the State

*Page-number appearing at foot of page of original certified Record.

of California, to wit, section 3 of article XII of the Constitution of said State, and section 322 of the Civil Code of said State, each stockholder of a corporation organized under the laws of said State is individually and personally liable for such proportion of all of the debts and liabilities of a corporation in which he is a stockholder, contracted or incurred during the time he was a stockholder in such corporation, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and so liable during the whole of the month of January, 1913, ever since and now.

III.

That during the whole of said month of January, 1913, said Pacific Shipping Company had a total amount of shares of its capital stock subscribed in amount 4597 shares and respondents herein each owned the following number of shares thereof, to wit: Mary A. Adams, 106 shares, Allen Shipping Company, 61 shares, Leon Blum, 38 shares, C. W. Brandt, 17 shares, Byxbee & Clark Company, 32 shares, J. M. Colman, 4 shares, Havaside, Withers & Davis, 21 shares, E. Henrix, 19 shares, D. B. Hinkley, 8 shares, Excelsior Investment Company, 155 shares, Russ Mill and Lumber Company, 29 shares, [12] Laura M. Huntoon, 11 shares, C. A. Hooper & Company, 54 shares, S. G. Johnson, 2 and one-half shares, H. C. Jensen, 8 shares, T. J. Jorgensen, 3 shares, E. Kallenberg, 11 shares, E. H. Kittredge, 19 shares, C. A. Klinkenberg, 2 shares, Otto Lindholm, 12 shares, Anna Maas, 4 shares, Marine In-

vestment Company, 8 shares, C. F. Michaels, 40 shares, The Charles Nelson Company, 353½ shares, A. A. Baxter, 5 shares, A. E. Cooley, 5 shares, S. C. Denson, 5 shares, L. Segelhorst, 5 shares, James Tyson, 21 shares, Clara Peterson, 35 shares, F. B. Peterson, 11 shares, Otto Peterson, 21 shares, F. L. Pritchard, 128 shares, D. Roth, 53 shares, Z. Russ & Sons Company, 33 shares, Austin Sperry, 10 shares, H. B. Sperry, 10 shares, Kate E. Spiers, 8 shares, F. W. Voogt, 10 shares, Frances J. Wilson, 13 Shares, Mabel Lois Hodge 6½ shares, Thomas Carroll Hodge, 6½ shares, Stella H. Wayman, 4 shares, Florence E. Williams, 4 shares, and Amelia Wetzel Yschudi, 4 shares.

IV.

That on all of the dates and times herein mentioned, respondents Allen Shipping Company, Byxbee and Clark Company, Haviside, Withers & Davis, Excelsior Investment Compnay, Russ Mill and Lumber Company, C. A. Hooper and Company, Marine Investment Company, The Charles Nelson Company, and Z. Russ and Sons Company, were and now are corporations organized and existing under and by virtue of the laws of the State of California.

V.

That on the 28th day of January, 1913, said Pacific Shipping Company and libelant made executed and entered into each with the other a certain agreement in writing, in the form commonly known as shipping articles, at the city and county of San Francisco where the said vessel "Americana" then was, under and by which the said Pacific Shipping Com-

pany hired and employed libelant to serve as seaman on said [13] vessel for a voyage from said San Francisco to a place called Knapton in the State of Washington, and libelant in said agreement agreed so to serve at the wages of forty-five (\$45) dollars per month, that said shipping articles were not signed before any United States Shipping Commissioner whatever, and thereafter and on the same day the said vessel with libelant on board thereof under said agreement left the said San Francisco on said voyage and thereafter safely arrived at the said place called Knapton.

VI.

That said Pacific Shipping Company negligently and carelessly sent the said vessel to sea from said San Francisco with libelant so on board on the day last above mentioned, in an unsafe and unseaworthy condition in this, that upon and as a necessary part of the equipment of said vessel, was a certain mechanical structure of contrivance called a windlass, it being used thereon in raising and lowering the anchors of said vessel of which there *was* two and it also being used in pulling in and letting out and securing said anchor and the anchor chains of said vessel; of which anchor chains there *was* also two, whenever it was necessary in the operation of said vessel so to do, and it also being used to hold the said anchor chains and prevent them from moving when a strain was placed on said anchor chains from any cause, there being at said times one anchor chain on the port side of said vessel and one on the starboard side thereof, there also being on said

windlass two chain sheaves one on each of said sides of said vessel, over which the said anchor chains led and *laid*, the said chain sheaves being so arranged that in the *periphery* of each of said chain sheaves were receptacles into which the links of said anchor chains fitted and locked, so that, the said sheaves being round and each of which were firmly keyed on to a shaft and fastened thereto [14] neither of said anchor chains could move unless the said sheaves, which were also called wilcats, unless the said sheaves and the shaft upon which they were so keyed and fastened revolved; that to prevent such shaft and said sheaves from revolving when the operation of the said vessel required that they should not revolve there was on all of said times fitted to, and keyed on to said shaft two contrivances called compressors, each of which compressors consisted of an iron brake wheel, and around each of said brake wheels there was placed an iron band which was firmly affixed to the frame of said windlass in such a manner that it could not rotate; that when it was desired to stop either of the said anchor chains from moving or both from moving the said iron bands were tightened around the said brake wheels by means of a screw on each of said bands which drew the said bands together, that is to say the ends of each of said bands together, and so tightened them around said brake wheels, and thus when the said brake wheels and bands around the same were in proper order and the said bands were tightened around said brake wheels, the said shaft and said chain sheaves and brake wheels were

unable to rotate and the said anchor chains were firmly held and prevented from moving; that when it became necessary in the operation of said vessel to by power rotate the said shaft and the said chain sheaves, the same was done by the power of a steam donkey-engine, the power of which donkey-engine was transmitted therefrom to another shaft also attached to and a part of said windlass upon which shaft there was a small cog wheel which intersected with another and larger cog wheel which was firmly fastened to the said shaft upon which the said chain sheaves and brake wheels were, the cogs of each of said cog wheels intersecting with each other and the power of said donkey-engine was transmitted to the said shaft upon which the smaller of [15] said cog wheels was so fixed by and through an endless iron chain called a messenger; that in order to prevent persons who were working on said windlass or near to the same from being caught in said cog wheels when the said cog wheels rotated, they always rotating when the shaft upon which the said chain sheaves were rotated, it was necessary for a for a guard to be placed covering said cog wheels, and the said windlass was unsafe and defective without such guard, but the said vessel was operated at said time without such guards or any guard whatever on said cog wheels or covering the same and there was nothing to prevent a person near such cog wheels from becoming entangled in said wheels at any time; that the said compressors on said brake wheels and said windlass were unsafe and defective at the time she was sent to sea as

aforesaid and continued to be unsafe up to the time libelant was injured as hereinafter mentioned in this, that the bands on said brake wheels were rusted and badly worn and would not perform the service for which they were placed upon said windlass, in that they would not nor would either or both thereof at any time stop the said chain sheaves from revolving when a strain was placed upon such anchor chains or either thereof although such compressors were placed there for that purpose, and said windlass was defective and unsafe if said compressors would not prevent said chain sheaves from revolving at all times when it was necessary in the operation of said vessel to stop them from revolving and there was no other method of stopping said chain sheaves from revolving, windlasses on vessels usually having a contrivance called pawls to also prevent such chain sheaves from revolving but there *was* no pawls on the said “Americana,” or upon her windlass. [16]

That the said Pacific Shipping Company sent the said vessel to sea on the voyage aforesaid in tow of a steam vessel called the “Falcon” to be towed to the said Knapton thereby, the said “Falcon” towing the said “Americana” in the following manner to wit, by and through a hawser one end of which was fastened to the said “Falcon” and the other end of which was made fast to the port anchor chain of the said “Americana,” the said anchor chain being led over and fitting into the receptacles on the chain sheave on the port side of said vessel and from thence through an aperture on the port

bow of said vessel called a hawse pipe, the end of said anchor chain then being fastened to the said hawser of said "Falcon," which was customary way of towing vesels such as the "Americana" then was, that when the said "Falcon" was so towing the said "Americana" said "Falcon" exerted strain upon the said hawser and anchor chain, but no more strain than the said windlass was designed to hold or would hold when in proper order, but by reason of the defective condition of said compressors as aforesaid they would not prevent the said shaft upon which said chain sheaves were so affixed from at intervals rotating when the said "Americana" was so being so towed as aforesaid, that after the said vessels had so left said San Francisco and proceeded up the coast of California to a point about one hundred and eighty miles north thereof and while upon the waters of the Pacific Ocean the said vessels then being in a swell which caused the said "Americana" to pitch to some extent, but not to an immoderate or unusual extent, the condition of the wind and sea being a usual and ordinary condition of the wind and sea at the place where the said vessels were at that time of the year, without the fault of anyone but wholly incident to ocean towing, the strain upon said anchor chain became and for a short time prior thereto had been irregular and at times the said chain sheaves rotated by reason of the said compressors being [17] unable by reason of their defective condition as aforesaid to stop them from rotating, that the master, mates and crew of said vessel, she having such in her service

at that time used every endeavor to stop such rotation by and through such compressors to stop such rotation and also by and through ropes *with they* tied the said anchor chain to posts on said *vessel* stop such rotation, it being necessary in the towing of said vessel so to do all to stop the said anchor chain by which the said vessel was so being towed from rendering out and to hold the same stationery but it was impossible by reason of the said defective condition of said compressors so to do.

That on the evening of the 29th day of January, 1913, while the said "Americana" was being towed as aforesaid and the said windlass was in the condition aforesaid libelant was ordered by the master of said vessel to go to the starboard side of said windlass to clear away some anchor chain that had accumulated there by reason of the said windlass having rotated as hereinbefore set forth, and while so engaged the said windlass by reason of its defective condition as aforesaid began to rotate without the knowledge or fault of libelant but by reason of the said compressors being unable to stop it from so doing when the strain of the towing of said vessel was thereon, and thereupon, by reason of such rotation, libelant's left hand and arm became caught between the cogs of said cog wheels where they intersected as hereinbefore described and his said left hand and arm were dragged into said cog wheels between the cogs thereof where said cogs so intersected and his said left hand and arm were badly crushed and it became necessary to cut his arm off to extricate him from said cogs and thereafter by

reason of his said injuries he was compelled to have his left arm amputated above the elbow, and he suffered great mental and physical pain and mental suffering and ever since and forever he will be prevented from following his occupation as a seaman, having been mate on vessels prior to his [18] said injuries, all by reason of the defective condition of the said windlass as aforesaid and the negligent and careless conduct of said Pacific Shipping Company in operating and sending the said "Americana" to sea on the voyage aforesaid and the inability of said compressors to stop the said windlass from rotating as aforesaid, that whenever the said windlass rotated it always caused the said cog wheels to rotate, all to the damage of the libelant in the sum of twenty-five thousand (\$25,000) dollars.

VII.

That at the times aforesaid the said "Americana" had no cargo, was light and easily towed.

VIII.

That under and by virtue of the laws of the State of California, to wit, section 359 of the Code of Civil Procedure of said State, an action can be brought against a stockholder of a corporation to enforce a liability against such stockholder within the years after the liability is created; that libelant has not been guilty of laches in prosecuting this action for the reason that on the 3d day of April, 1913, at which time said Pacific Shipping Company in value largely in excess of any judgment he could recover against it for his said injuries, he filed a complaint

in the Superior Court of the State of California, in and for the city and county of San Francisco, praying for damages for his injuries aforesaid, that thereafter such proceedings were had in the action so commenced that on the 15th day of September, 1914, he recovered an action against said Pacific Shipping Company in such action for the sum of five thousand (\$5,000) dollars damages and \$88.10 costs, that prior to the recovery of such judgment said Pacific Shipping Company without the knowledge of libelant became bankrupt, without any property whatever, and it is now impossible to make said judgment or any part thereof, and none thereof has been paid. [19]

IX.

That during the whole of the month of January, 1913, under the laws of the State of California contributory negligence of an employee, if any would not bar a recovery for damages for personal injuries by an employee against an employer where the negligence of the employer was gross and that of the employee slight in comparison, but the damages could be diminished in proportion to the amount of negligence attributable to the employee, *now* was it nor is it a bar to such an action that the employee either expressly or impliedly assumed the risk of the hazard complained of, nor was it a bar to such an action that the injury complained of was caused in whole or in part by the want of ordinary care of a fellow servant.

X.

That all and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that the respondents above named may be *required* to answer under oath all and singular the premises aforesaid, that *that* this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and that judgment *may entered* against said respondents therefor individually as the amount of the shares of capital stock owned by each thereof on the 29th day of January, 1913, bore to the whole of the subscribed capital stock of said corporation, and that he, the said libelant, may have such other and further relief in the premises as the Court is competent to give.

H. W. HUTTON,

Proctor for Libelant. [20]

United States of America,

Northern District of California,—ss.

Louis Buttner, being first duly sworn, deposes and says as follows:

I am the libelant above named. I have read the foregoing amended libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

LOUIS BUTTNER.

Subscribed and sworn to before me this 5th day of December, 1914.

[Seal]

L. H. ANDERSON,
Notary Public in and for the City and County of
San Francisco, State of California.

Copy received this 5th day of December, 1914.

DENSON, COOLEY & DENSON,
Proctors for Respondents.

[Endorsed]: Filed Dec. 8, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

[Title of Court and Cause.]

Exceptions to Amended Libel.

To the District Court of the United States, for the
Northern District of California.

The exceptions of all the respondents to the amended libel and complaint of Louis Buttner against these respondents on file herein avers as follows:

1.

That the said amended libel does not state facts sufficient to constitute a cause of action.

II.

That libelant's alleged cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court, and that this court has no jurisdiction over the subject matter of said alleged cause of action.

III.

It appears from said libel that the libelant elected to bring suit in the Superior Court of the city and

county of San Francisco, State of California, and against Pacific Shipping Company, a corporation, and that he has procured judgment in said Superior Court against said corporation for an adequate amount as damages, notwithstanding which he is now endeavoring [22] to come into this Honorable Court of Admiralty jurisdiction to assert the same claim sued on in said Superior Court, and it appears that because of the said conduct and election of said libelant to submit himself and his cause of action to the jurisdiction of the Superior Court, his cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court.

IV.

That it appears from said libel or complaint that the cause of action attempted to be set up therein is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure of the State of California.

V.

That it appears from said libel or complaint that the cause of action and damages alleged therein is barred by the laches of the said libelant in delaying for more than a reasonable time the commencement of proceedings in this court and that libelant's excuse for his delay is inadequate and insufficient, for it appears that he elected to rely upon an action at law in the State Court and to prosecute an action against the Pacific Shipping Company alone, when he might have made the stockholders thereof parties defendant therein.

WHEREFORE, these respondents, and each of them, pray that they may be hence dismissed and that their costs and expenses may be decreed to them.

DENSON, COOLEY & DENSON,

Proctors for Respondents.

Service of the within Exceptions to Amended Libel and receipt of a copy thereof this 15th day of December, 1914, is hereby admitted.

H. W. HUTTON,

Proctor for Libellant.

[Endorsed]: Filed Dec. 15, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 27th day of January, in the year of our Lord, one thousand nine hundred and fifteen. Present: the Honorable, M. T. DOOLING, District Judge.

[Title of Court and Cause.]

**[Order Sustaining Exceptions to Libel and
Dismissing Libel.]**

The Court this day filed opinion and ordered that the exceptions to the libel, heretofore filed and submitted herein, be, and the same are hereby, sustained and the libel dismissed. [40]

[Title of Court and Cause.]

**(Opinion and Order Sustaining Exceptions to Libel
and Dismissing Libel.)**

H. W. HUTTON, Esq., Proctor for Libelant.

DENSON, COOLEY & DENSON, Proctors for
Respondents.

In this action the libelant seeks to recover from the respondents, forty-five in number, the sum of \$25,000 as damages for injuries received on January 29th, 1913, on the sailing vessel "Americana," alleged to have been the property of the Pacific Shipping Company, a California corporation. The respondents are alleged to have been stockholders in the said corporation at the time the injury was received, and the liability sought to be fixed upon them by this action is the stockholders' liability provided for in the constitution and Civil Code of California. This provision is as follows:

"Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

The libel sets forth facts tending to show that the injuries were the result of the negligence of the corporation, and [41] that as the damages occasioned him was a liability of the corporation incurred while respondents were stockholders, re-

covery is sought against them. The libel discloses the further fact that libelant on April 3d, 1914, commenced an action in the Superior Court of California, in and for the city and county of San Francisco, against the said Pacific Shipping Company for the damages occasioned by this same injury, in which action on September 15th, 1914, he recovered judgment for the sum of \$5,000 damages and \$88.10 costs, which judgment he has been unable to satisfy because of the insolvent condition of the judgment debtor. The libel was filed in this court on October 21st, 1914, a month after the rendition of judgment by the State Court in favor of libelant and against the corporation.

Under the constitution provision respondents are liable only for the liabilities of the corporation incurred while they were stockholders. This action is for \$25,000, but it has already been judicially determined by a court of libelant's own selection, and which had full jurisdiction of the parties and the subject matter, that the liability of the corporation itself was only \$5,000. The liability of respondents, therefore, cannot in any event exceed that sum. It is quite true that libelant was under no obligation to proceed against the corporation as a condition precedent to his right of action against respondents in this court, if such existed, but having selected his tribunal, and recovered a judgment in the common law courts of the State, he cannot now be permitted to endeavor to enforce that judgment by suit in this court. But the judgment is now the measure of respondents' liability, and if this action

were permitted to proceed at all it could proceed only for the amount of the judgment. This being so the action cannot be regarded as a suit on the original and indefinite claim for damages, which was of a maritime nature, but in reality as an [42] action on a judgment not of a maritime character. The libellant having selected the State tribunal to fix the liability, should be relegated to the State tribunals to enforce it.

The exceptions to the libel are therefore sustained, and the libel dismissed.

January 27th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 27, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [43]

[Title of Court and Cause.]

Petition for a Rehearing.

Libellant above named respectfully petitions the above-entitled court, and the Judge thereof for a rehearing and a reconsideration of the points involved on the exceptions to his libel herein, and offers the following as reasons therefor.

I.

As we understand the Court's opinion herein it is that the liability of the corporation being fixed by a judgment, the original liability has become merged in the judgment, and only an action on the judgment will lie against the stockholders, and it follows of course, that this court has no jurisdiction

over a cause of action on the judgment.

II.

We admit that is the law under some statutes, but it is not the law under the California constitution and statutes, and the decisions of the United States and State Courts are uniform to the contrary as follows: [44]

In the case of Thomas vs. Mathieson, 232 U. S. 222 the United States Supreme Court says on page 236, having occasion to consider Section 322, of the California Civil Code, says:

“The Defendant was a principal debtor, Hyman vs. Coleman, 82 Cal. 650.”

In the Hyman vs. Coleman so approved by the United States Supreme Court, we find the following on page 653.

“It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts contracted while he was a stockholder, *as a principal debtor, and not as a surety. Cases cited.*

The liability commences and a right of action accrues against the stockholders at the same time.

Suspension of the remedy against the corporation does not suspend the remedy against *or affect the liability of the stockholders.*

In the case of Young vs. Rosenbaum, 39 Cal. 646, a judgment against the corporation was pleaded This case was cited in the brief in Dolbear v. Foreign Investment Co., 196 Fed. 646, cited by libelant on the

argument. The Supreme Court of the State of California says on page 654.

“Had the judgment been proven, it would not have constituted a bar to the action. The stockholders are not sureties of the corporation, but are principal debtors. *A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it.* The remedy against the corporation may, for some cause be suspended, or, perhaps, barred without impairing the remedy against the stockholders, because the liability of the latter is primary, and is conditional or contingent only in this; that there must be a subsisting debt against the corporation. When a debt accrues against the corporation, it also accrues against the stockholders and they remain such debtors until the debt is paid or satisfied.

The Supreme Court was dealing with a debt at that time, but the rule would be identical if it was a liability, as both are covered by the same language in the constitution or law.

In the case of Herman vs. Hecht, 116 Cal. 553, the Supreme Court of California, says on page 561: [45]

“The Court also erred in admitting evidence that the plaintiff had sued the corporation and caused a writ of attachment to issue, and that said action was still pending. *That fact constituted no defense to plaintiff's action;* but if it did, it was not pleaded, and therefore not available to the defendants.

In the case of Nielson vs. Crawford, 52 Cal. 248, the same Court says on page 249,

“If an admission of indebtedness, made by a corporation, be evidence of indebtedness in an action against a stockholder, it is nor perceived * * * for instance, *a judgment rendered*—should not equally estop a stockholder to deny the fact of indebtedness in an action brought against him to enforce his proportionate liability. It is well settled here that the liability of the stockholder *is not derivative nor secondary, but is of a primary* and wholly independent character, and the indebtedness for which he is to be held cannot be shown by entries made by the employees of the corporation, over which he has no supervision, and can exercise no control.

In the case of Winona Wagon Co. v. Bull, 108 Cal. 1, the same Court says on page 5.

“The complaint bases the right to recover on the making of the note *and the judgment against the corporation*; but, as the liability of the stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient (quoting from Hunt vs. Ward, 99 Cal. 612.)”

In the same case that is in 108 Cal., the same Court further says on page 6, quoting from Trippe v. Hunccheon, 82 Ind. 307, where an action had been brought against stockholders on a judgment obtained against the corporation.

“* * * It is upon this obligation that the creditor who seeks to charge the members of the corporation as individuals must sue—not upon a judgment obtained against the corporation.”

In the recent case of *Johnson vs. Breneger et al.*, No. 15,645, Second Division of this court, his Honor Judge Van Fleet recently held, that the liability of a stockholder *was primary*, and not secondary, and that it dated back to the origin of the liability sought to be enforced. [46]

II.

A PARTY SEEKING TO ENFORCE A STOCKHOLDER'S LIABILITY HAS A RIGHT TO SUE IN ANY COURT HAVING JURISDICTION.

The United States Supreme Court in *Flash vs. Conn*, 109 U. S. 371 says:

“The right of the plaintiff to sue upon the liability in any Court having jurisdiction is therefore clear, *Dennich vs. Railroad Co.*, 103 U. S. 11.”

See, also, *Whitman vs. Oxford Bank*, 176 U. S. 565; *Huntington vs. Attroll*, 146 Id. 657; *Selig vs. Hamilton*, 234 Id. 652.

And the case of *Dolbear vs. Foreign Mines Investment Co.* 196, Fed. 646, decided by the Circuit Court of Appeals for this Circuit and cited on the argument.

III.

THE LIABILITY OF A STOCKHOLDER DEPENDS ENTIRELY UPON THE STATUTES, etc.

In some State the statute law makes the liability dependent upon the obtaining of a judgment, in others only a trustee can sue, in some a judgment against the corporation is conclusive against the stockholders.

Hancock vs. National Bank, 176 U. S. 640.

However the decisions of the courts of last resort, both Federal and State, are that under the laws of California, a person seeking to enforce the liability *of stockholder*, must sue on *the original liability alone*, and he cannot sue on a judgment, or on an obligation given by the corporation.

In this case suppose libelant had not obtained judgment for five years, he could not have recovered against the stockholders at all, if he had to sue on the judgment as the statute runs against them in three years. [47]

In conclusion we beg to state, that the United States Supreme Court once said in case not necessary to cite, that the growing tendency in American business affairs was to carry on business as corporations to escape personally liability, and it was for that reason the different States had passed their several statutes, and such statutes should be enforced in all proper cases.

We respectfully ask for a rehearing, and further argument on the exceptions if the Court shall deem it necessary.

Respectfully,

H. W. HUTTON,
Proctor for Libelant.

[Endorsed]: Filed Feb. 24th, 1915. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[48]

[Title of Court and Cause.]

Reply to Petition for Rehearing.

As is stated in the opening paragraphs of libel-
ant's petition for rehearing, counsel is asking simply
for a "reconsideration of the points involved on the
exceptions to his libel herein"

This matter was argued very thoroughly in open
court on the hearing of the exceptions to the libel
and authorities were cited at length at that time.
The matter has been fully considered, and if libel-
ant is dissatisfied with the decision of this Court he
has his remedy in an appeal therefrom. As was
said by Mr. Justice Field, in *Giant P. Co. vs. Cal.*
V. P. Co., 5 Fed., at page 201,

"A new hearing should not be had simply to
allow a rehashing of old arguments."

Mr. Justice Story voiced the same view in *Jenkins*
v. Eldridge, 3 Story, at 305, when he said,

"If rehearings are to be had until the counsel
on both sides are entirely satisfied, I fear that
suits would become immoral, and the decision
be postponed indefinitely." [49]

We quote from *Foster's Federal Practise* (5th
ed.), page 1396, as follows:

"Unless the Judge acts of his own motion, a
rehearing will be granted only for errors of law
apparent upon the record and arising upon

questions which *were not argued at the original hearing*, or upon new discovered evidence of such a character that it would have authorized a new trial in the action at law." (Citing cases.)

Counsel presents no new reasons in support of his libel. The points are the same as those made at the argument upon the exceptions. We do not differ with him as to the law stated in the cases cited in the petition for rehearing, but we do contend that they are inapplicable to the questions at bar, and do not in *any weaken* the decision of this Court on the exceptions.

The liability of the stockholders is a liability created by law, as stated in the cases cited by counsel, and is a primary obligation. But the weakness of counsel's position lies in the fact that he has overlooked the proposition that the stockholders are liable only for the debts of the corporation, and that the debt of the corporation in this instance became a fixed amount when, and only when, the State Court rendered a judgment against it for the sum of \$5,000. There can be no question that the libelant might have sued the stockholders originally, either with or without joining the corporation, for any amount that he might choose to name, and that in such action the liability could be fixed and determined by any Court of competent jurisdiction. He, however, elected to have the State Court fix and determine the amount of that liability in an action brought against the corporation and is of necessity bound by that determination. The original action

was one for tort. The tort was not committed by the stockholders but by the corporation [50] itself, acting through its agents, and the State Court has found that the corporation is liable for that tort, in the sum of \$5,000. This Court cannot be asked at this time to retry a matter originally tried in the State Court.

See *Hyatt v. Challiss*, 55 Fed. 267;

Bailey v. Willeford, 126 Fed. 803;

Forsyth v. Hammond, 156 U. S. 507, 41 L. Ed., page 1095.

This is an action to recover upon a statutory liability and is not an action in tort.

See *Pacific Surety Co. v. L. & S. T. & W. Co.*, 151 Fed. 440,

Morrow v. Superior Court, 64 Cal. 383.

We shall not go into a lengthy discussion of this matter for the reasons, as above stated, that it was thoroughly presented in all its aspects by respective counsel on the first hearing.

We respectfully submit that the petition for rehearing should be denied.

A. E. COOLEY,

Proctor for Respondents.

[Endorsed]: Filed Feb. 25th, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[51]

**[Order Denying Petition for a Rehearing and
Dismissing Cross-libel.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Thursday, the 27th day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

[Title of Court and Cause.]

In this cause the Court ordered that libelant's petition for rehearing be, and the same is hereby, denied. Further ordered that in view of respondents having procured the dismissal of the libel herein, that their cross-libel be, and the same is hereby, likewise dismissed. [52]

**[Order Denying Petition for Rehearing and
Dismissing Cross-libel.]**

[Title of Court and Cause.]

H. W. HUTTON, Esq., Proctor for Libelant.

DENSON, COOLEY & DENSON, Proctors for
Respondents.

Libelant's petition for rehearing is denied.

Respondents having procured the dismissal of the libel herein, their cross-libel will also be dismissed.

May 27, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [53]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

LOUIS BUTTNER,

Libelant,

vs.

MARY C. ADAMS et al.,

Respondents.

Final Decree.

For the reasons stated in the opinions on file in
the above cause the libel and cross-libel herein are
each dismissed.

Dated June 7, 1915.

M. T. DOOLING,

Judge.

Entered in Vol. 6, Judg. and Decrees, at Page 285.

[Endorsed]: Filed Jun. 7, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [54]

[Title of Court and Cause.]

(Notice of Appeal.)

The respondents in the above-entitled cause and
their proctors will please take notice, that libelant
above named hereby appeals to the United States
Circuit Court of Appeals for the Ninth Circuit, from
the final decree in said cause, the said decree hav-

ing been given and made therein and being dated the 7th day of June, 1915, and from the whole of said decree.

Dated July 24th, 1915.

H. W. HUTTON,

Proctor for Appellant and Said Libelant.

Copy received this 24th day of July, 1915.

DENSON, COOLEY & DENSON,

Proctors for Respondents.

[Endorsed]: Filed Jul. 24, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [55]

[Title of Court and Cause.]

Assignment of Errors.

- 1st. The Court erred in dismissing libelant's libel.
- 2d. The Court erred in denying libelant's petition for a rehearing.
- 3d. The Court erred in finding and deciding that libelant's libel was filed to enforce the judgment recovered by him in the Superior Court of the city and county of San Francisco.
- 4th. The Court erred in finding and deciding that the said judgment so obtained by libelant was the measure of respondents' liability.
- 5th. The Court erred in finding and deciding that libelant could only proceed against respondents for the amount of the judgment obtained against Pacific Shipping Company by libelant in the Superior Court of the city and county of San Francisco.
- 6th. The Court erred in finding and deciding that libelant's libel could only be regarded as a suit on

the judgment and not on the original claim for damages.

7th. The Court erred in finding and deciding that libelant having brought a suit against Pacific Shipping Company in a State court he [56] should be relegated to such court to enforce the judgment there obtained by him.

8th. The Court erred in finding and deciding that the judgment obtained by libelant against Pacific Shipping Company in the Superior Court of the city and county of San Francisco, State of California, in any way affected his right to sue the stockholders of said Pacific *Shipping* on the original liability.

9th. The Court erred in considering the judgment obtained by libelant against Pacific Shipping Company in any way whatever herein excepting in so far as showing that libelant had not been guilty of laches in suing the stockholders of said Pacific Shipping Company, the said judgment not being a final judgment nor having become final when the libel was filed nor has it become final since.

H. W. HUTTON,
Proctor for Libelant.

Copy received this 5th day of August, 1915.

DENSON, COOLEY & DENSON,
Proctors for Respondents.

[Endorsed]: Filed Aug, 5, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [57]

[Endorsed]: No. 2650. United States Circuit
Court of Appeals for the Ninth Circuit. Louis

Buttner, Appellant, vs. Mary A. Adams, Allen Shipping Company, Leon Blum, C. W. Brandt, Byxbee & Clark Company, J. M. Colman, Haviside, Withers & Davis, E. Henrix, D. B. Hinckley, Excelsior Investment Company, Russ Mill and Lumber Company, Laura M. Huntoon, C. A. Hooper & Company, S. G. Johnson, H. C. Jensen, T. J. Jorgensen, E. Kallenberg, E. H. Kittredge, C. A. Klinkenberg, Otto Lindholm, Anna Maas, Marine Investment Company, C. F. Michaels, The Charles Nelson Co., A. A. Baxter, A. E. Cooley, S. C. Denson, L. Segelhorst, James Tyson, Clara Peterson, F. B. Peterson, Otto Peterson, F. L. Pritchard, D. Roth, Z. Russ & Sons Company, Austin Sperry, H. B. Sperry, Kate E. Spiers, F. W. Voogt, Frances J. Wilson, Mabel Lois Hodge, Thomas Carroll Hodge, Stella H. Wayman, Florence E. Williams and Amelia Wetzel Yschudi, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 7, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Designation of Appellant as to Printing Record.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

LOUIS BUTTNER,

Libelant and Appellant,

vs.

MARY A. ADAMS et al.,

Defendants and Appellees.

The appellant above-named intends to rely upon all of the errors assigned in his assignment or errors herein on this appeal, and designates the following parts of the record which he thinks necessary of the consideration thereof by the Appellate Court, to wit: The amended libel.

The exceptions to the amended libel.

The order sustaining the exceptions to the amended libel and the opinion of the Court thereon.

The petition for a rehearing, and the answer to the petition for a rehearing.

The order denying petition for a rehearing.

The decree of the Court and the notice of appeal.

Insert the names of all of the parties in the first paper printed, and all subsequent papers, omit the title of the court and caption and print in place thereof the following: (Title of Court and Cause.).

Dated September 7th, 1915.

H. W. HUTTON,

Proctor for Appellant.

[Endorsed]: No. 2650. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Buttner, Libelant and Appellant, vs. Mary A. Adams et al., Defendants and Appellees. Designation of Parts of Record Necessary to Print. Copy Received this 7th day of September, 1915. Denson, Cooley & Denson, Proctors for Appellees. Filed Sep. 7, 1915. F. D. Monckton, Clerk.

No. 2650

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

LOUIS BUTTNER,

Libelant and Appellant,

VS.

MARY A. ADAMS et al.,

Respondents and Appellees.

BRIEF FOR APPELLANT.

H. W. HUTTON,
Proctor for Appellant.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Libelant and Appellant,

VS.

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Respondents and Appellees.

BRIEF FOR APPELLANT.

Statement of Facts.

In this case, Louis Buttner, the appellant was a seaman on board of the American schooner "Americana" whose home port was the Port of San Francisco, he shipping for a voyage from that place to Knappton in the State of Washington. The vessel was defectively equipped, having a defective windlass on board, and on the voyage he became entangled in some gear wheels on the windlass, and being dragged in by its intermittent rotation, the

mate of the vessel had to cut his arm off with a knife and razor, to save his life.

The vessel was owned by the Pacific Shipping Company, a California corporation, and he filed his libel herein against all of the stockholders of that corporation.

This action is one *for damages for a tort* and the libel.

Paragraph I sets forth the incorporation of the "Pacific Shipping Company", its residence, and ownership of the "Americana".

Paragraph II sets forth the laws of the State of California respecting the liability of stockholders of a corporation.

Paragraph III sets forth the number of shares of the subscribed capital stock of the "Pacific Shipping Company", and the respective holdings of the respondents.

Paragraph V sets forth the hiring of the libelant.

Paragraph V sets forth the negligence of the Pacific Shipping Company in sending the vessel to sea, it being therein described in detail the defects in the windlass, the nature of the injuries to libelant, and the amount of his damage, which is set at \$25,000.00.

Paragraph VIII sets forth that an action can be commenced under the laws of the State of California, on such a liability, within three years "after the liability is created", and that he had commenced

an action against the Pacific Shipping Company, in the Superior Court of the State of California, in and for the City and County of San Francisco, praying damages for the same injuries, and had recovered judgment in amount \$5000.00, and \$88.10 costs; that the said Pacific Shipping Company had become bankrupt during the pendency of the action, and the judgment could not be made.

The prayer is for \$25,000.00 damages, and for judgment against the stockholders according to their respective holdings.

There being no statutes of limitation in admiralty, the matter about the judgment was simply pleaded to show there had been no laches and that is the only effect it could have, as the action was upon the original liability for the tort, and the court so found (page 17 of Transcript).

“In this action the libellant seeks to recover from the respondents, forty-five in number, the sum of \$25,000 *as damages* for injuries received on January 29th, 1913, on the sailing vessel ‘Americana’.”

Exceptions to the libel were filed, the third reading (pages 14 and 15):

“It appears from said libel that the libellant elected to bring suit in the Superior Court of the City and County of San Francisco, State of California, and against Pacific Shipping Company, a corporation, and that he procured judgment in said Superior Court against said corporation for an adequate amount as damages, notwithstanding which he is now endeavoring to come into this honorable court of admiralty

jurisdiction *to assert the same claim sued on in said Superior Court* and it appears that because of the said conduct and election of said libelant to submit himself and his cause of action to the jurisdiction of the Superior Court, his cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court."

The lower court sustained that exception, *held in effect if not in terms that the original cause of action had been merged in the judgment, and an action upon the original liability would not lie*, but that the suit should have been upon the judgment.

The questions involved in this appeal are:

When a judgment has been obtained by a person against a corporation, and an action for the same thing subsequently commenced against the stockholders, is the subsequent action upon the judgment or upon the original liability?

Argument.

I.

THE LIABILITY OF A STOCKHOLDER IS A PRIMARY LIABILITY.

This court has so decided in the case of *Dolbear v. Foreign Mines Investment Co.*, 196 Fed. 646.

In that case an action was pending against the corporation and another action was commenced against the stockholders. It was claimed that two actions could not be maintained. This court held directly to the contrary, directly holding that the

liability of the stockholder was a primary liability. Under that decision libelant's libel was properly filed upon the original liability.

For additional cases in point,

Thomas v. Mathieson, 232 U. S. 222,

where the U. S. Supreme Court said:

"The defendant was a principal debtor."

Citing approvingly,

Hyman v. Coleman, 82 Cal. 650.

In that case it was held:

"It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts contracted while he was a stockholder as a principal debtor, and not as a surety." (Cases cited.)

The liability commences and a right of action accrues against the corporation and stockholders at the same time.

"Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders. A judgment against the corporation does not create a new liability nor extend the time prescribed by the statute for bringing suit against the stockholders."

It was that language that was before the U. S. Supreme Court, in the above case. For additional authorities we cite:

Young v. Rosenbaum, 39 Cal. 646;

Morrow v. Superior Court, 64 Id. 383;

Faymondville v. McCullough, 59 Id. 285;

Hunt v. Ward, 99 Id. 612;

Knowles v. Sandercook, 107 Id. 629.

It will be remembered that the Constitution of this state reads in part:

“Each stockholder of a corporation is individually and personally liable for such proportion of all its *debts and liabilities* * * * ”

The code section is somewhat similar to statutes of other states, most of them reading debts. It has been held, however, that *debt* was broad enough to cover an action for a tort. In this state, however, no such question can arise as we have the word *liabilities*.

Liability is synonymous with *responsibility* and liability includes responsibility for torts.

Richardson v. Harmon, 222 U. S. 96.

A liability, *responsibility for a tort*, against the stockholders of the corporation, owner and operator of the “Americana”, arose in this case. The lower court, however, held that there was no liability until a judgment was recovered, and that that, then, became the liability.

Without a liability in the first instance, there could be no judgment. The judgment did not create the liability, it was the negligence. *The judgment was simply the measure of damages for the liability, or the monetary amount of the liability.*

II.

A JUDGMENT DOES NOT MERGE THE LIABILITY.

The learned court held (pages 18 and 19):

“But the judgment is now the measure of respondents’ liability, and if this action were permitted to proceed at all it could proceed only for the amount of the judgment. This being so the action cannot be regarded as a suit on the original and indefinite claim for damages, which was of a maritime character, but in reality as an action on a judgment not of maritime character.”

The judgment was neither the measure of the stockholders’ liability nor did it in any way affect it. The law is well settled that a judgment does not merge or in any way affect the liability.

The law is correctly stated in the case of *Young v. Rosenbaum*, 39 Cal. 646, cited by this court approvingly in *Dolbear v. Foreign Mines Investment Company*, 196 Fed. 646, where it is said:

“Had the judgment been proven, it would not have constituted a bar to the action. The stockholders are not sureties of the corporation, but are principal debtors. A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it.”

Larabee v. Baldwin, 35 Cal. 155, 168.

“The claim of the respondent that the judgment is itself a contract creating a new debt, within the meaning of the statute, for which all who were stockholders at the date of the rendition of the judgment are personally liable, is too absurd to require argument to refute it.”

Hunt v. Ward, 99 Cal. 612, 613.

“The complaint bases the right to recover on the making of the note *and the judgment* against the corporation; but, as the liability of a stockholder *is a separate and independent one, commencing with and dependent upon the original indebtedness*, it is doubtful if the averments of the complaint in the case at bar are sufficient.’

See also, to the same effect:

Stilphen v. Ware, 45 Cal. 111;

Nielsen v. Crawford, 52 Cal. 248;

Winona Wagon Co. v. Bull, 108 Id. 1, 5;

Herman v. Hecht, 116 Id. 553, 561.

Trippe v. Huncheon, 82 Ind. 307.

In that case a judgment had been obtained against a corporation and it was held that suit must be brought, as it was in this case, on the original liability—*not upon the judgment*.

In Morrow v. Superior Court, 64 Cal. 386, cited in respondent’s answer to petition for a rehearing, it is said on page 386:

“The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation, as it would be if the act had made no provision for any other liability than that of stockholders for the debts of the company.”

This action is on tort on the original liability. The judgment had nothing to do with the matter except for the purpose of showing there was no laches. If counsel thought it had no place in the

pleading, they should have excepted for impertinent matter.

III.

THE DISTRICT COURT HAD JURISDICTION OVER THE ACTION FOR TORT.

The tort occurred on the high seas, on a California vessel. The laws of the state were applicable and endowed all on board. On a stockholder's liability a person can sue in any court having jurisdiction.

In *Flash v. Conn*, 109 U. S. 371, it is said:

“The right of the plaintiff to sue upon the liability in any court having jurisdiction is therefore clear. *Dennich v. Railroad Co.*, 103 U. S. 11.”

Whitman v. Oxford National Bank, 176 U. S. 565;

Huntington v. Attroll, 146 Id. 657;

Selig v. Hamilton, 234 Id. 657.

A tort on navigable waters is always within the admiralty jurisdiction. The statute in question *places the responsibility for the tort*, not for the judgment.

State statutes operate on the high seas in cases of tort, and a court of admiralty will enforce a right given by the local law of the vessel's domicile.

Moses v. Laurence City Bank, 149 U. S. 303;
The Corsair, 145 U. S. 335;

Stern v. La Compagnie Etc., 110 Fed. 996;
Aurora Shipping Co. v. Boyce, 112 C. C. App.
373;

Wack v. Thompson, 100 C. C. App. 57;
Darragh v. Wetter, 78 Fed. 7-14.

In the case of Crowley v. Northern Pacific R. R. Co., 159 U. S. 582, it is said:

“Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal Courts and may not enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts *may enforce on their equity or admiralty side*, precisely as they may enforce a new right of action given by statute upon their common law side,”
* * *

The Hamilton, 207 N. Y. 398.

State statutes operate on the high seas.

Wilson v. McNamee, 102 U. S. 572;
Crapo v. Kelly, 16 Wall. 610.

IV.

THIS WAS NOT A FINAL JUDGMENT AND COULD NOT BE SUED ON.

The judgment in this case was given and made September 15, 1914. The libel was filed about three months later. A judgment rendered in a California court *does not become final for six months* and, in the event of an appeal, not until the appeal is decided.

Vermont Marble Co. v. Black, 123 Cal. 21.

This judgment not being final, how, for that reason, could it affect this case? Supposing it had been appealed from, which it has; supposing that results in a reversal, what will the liability of the stockholders be then?

If the suit was upon the judgment and an appeal tied the judgment up until three years after the liability accrued, after the damage was done, libellant could not sue at all, as then it would be barred by the statute.

Some of the states have different laws. The law of this state is the best as, under it, a party does not have to wait for a judgment and, again, it is a better protection to the stockholders. Suppose the board of directors of a corporation confessed judgment in the Superior Court for any amount claimed whether correct or not, and the judgment was binding on the stockholders, what position would it place them in? The law of this state gives the stockholder a right to defend on the merits of the original liability and is the most equitable and fair.

There were good reasons for commencing this action in admiralty court. In the state court two actions would have been necessary on account of the statutory limits to court's jurisdiction; one would have to be commenced in the justice's court, the other in the superior court. In an admiralty court all could be joined in one action.

We submit that the lower court misapprehended the nature of a stockholder's liability in this case,

and that the decisions that have construed the statute are uniformly opposed to the ruling in this case.

In this case *the parties were different*. The foundation of the action was the same, but libelant could have recovered a much greater judgment if the proof warranted it. Additional damages might have been shown. The amount recovered against the corporation has nothing to do with what the stockholders might pay; they might have shown lesser damages and might have entirely defeated the action. This they have the right to try and do on a trial. So what has the judgment to do with this case?

There are some authorities cited in the answer to the petition for a rehearing in the transcript.

In *Hyatt v. Collins*, 55 Fed. 267, an action was brought in ejectment. Judgment went for the defendant. The plaintiff moved for a new trial, obtained one, dismissed the case, and then brought an action in the federal court. The parties were the same, the merits had been decided against the plaintiff and he wished to try another court. That is not this case; the parties are not the same, he prevailed and by reason of the fact that the respondents herein will not pay a debt they honestly owe, he is forced to sue them to compel them to do so.

Bailey v. Willeford, 126 Fed. 803.

That case had various stages. After losing out several times however in the state court, plaintiff

endeavored to secure an injunction to prevent the enforcement of the judgment.

We could not find anything in *Forsyth v. Hammond*, 156 U. S. 507, that has anything to do with this case.

Pacific Surety Co. v. L. & S. T. & W. Co., 151 Fed. 440, was an action on a bond given to enforce a charter party. The court held that while the charter party was maritime, the bond was not. In other words the original liability was maritime, but the secondary was not. *This case is on the original liability.*

We will say, however, that it has been held in this circuit to the contrary of what was held in the above case.

This action was not upon the judgment. It could not have been brought on the judgment. The judgment had nothing to do with the case, except to show there was no laches, and it was properly pleaded for that purpose. Without the allegation the libel would have been subject to exceptions. The action is upon the original liability for tort, and we submit the decision of the lower court should be reversed, and it should be directed to overrule the exceptions.

Dated, San Francisco,
March 6, 1916.

Respectfully submitted,

H. W. HUTTON,
Proctor for Appellant.

ADDENDA.

In our brief, the case of "The Hamilton" is given as 207 N. Y. 398. It should be 207 U. S. 398, and on page 405, it is said:

"We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. Being valid it created an obligation, a personal liability of the owner of the Hamilton to the claimants. * * * This, of course, admiralty would not disregard, but would respect the right when brought before it in any legal way."

In the quotation from Freeman on Judgments found on page 4 of appellee's brief, we find:

"The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties."

The parties are different in this case.

Section 9 of Black on Judgments, a quotation from which appears on page 5 of appellee's brief, treats on whether a judgment upon a tort is a contract or not. It has nothing to do with a stockholder's liability.

Hawkins v. Glenn, 131 U. S. 319, was a case where a judgment went against a corporation and an attempt made to make the judgment from unpaid stock assessments. It was held that the unpaid assessments were the property of the

corporation and the decree could not be collaterally attacked.

The general doctrine in the other cases cited is to the effect that, where a party has sued in the State Court, failed to prevail and then went to the Federal Court with the same case and same parties, that, as the issues, parties and evidence were the same, and the results would in all probability be the same, that the Federal Court would not entertain the case for the reason that plaintiff's *case had no merit*.

In this case, where plaintiff did prevail, and the parties are different, by a parity of reasoning, libelant is properly in the Federal Court.

We respectfully submit that there is no distinction between a case of tort arising from a breach of duty of an employer to furnish proper appliances, and any other case. There is a breach of the contract of employment in such a case.

All the judgment in such a case decides is that there was negligence, the amount of the judgment being the measure of damages.

The negligence creates the liability and is the primary liability.

In action for breach of contract the judgment simply establishes there has been a breach and judicially determines the amount of the damages suffered.

In an action for a disputed debt the judgment establishes that there was a debt and establishes the amount thereof.

There is no observable difference in either action. One cause of action is just as indeterminate as the other and there is no ground on which to hold that an action for negligence is any different to any other action, in so far as the primary liability is concerned.

But still in the light of all of the foregoing, the judgment of the Superior Court was not *res adjudicata*, and is not now *res adjudicata*. The action in which it was rendered is not final.

People v. Bank of San Luis Obispo, 159 Cal. 65-81.

“An action, under section 1049 of the Code of Civil Procedure, is to be deemed pending while an appeal from the judgment is pending, *or until the time for such an appeal has expired*, but when the judgment upon the appeal has been determined by an affirmance of the judgment, *or when the time for appeal has expired*, the judgment is admissible in evidence as *res adjudicata* and to raise an estoppel in bar of the action.”

The record does not show an appeal was pending. An appeal was, however, taken after the libel herein was filed; but the time in which to take an appeal had not expired, so for that reason, if for no other, libellant could only sue on the primary liability. But still the law is clear, that

a judgment whether final or not, does not in any way affect the liability of a stockholder, and has nothing whatever to do with a stockholder's liability.

Respectfully submitted,

H. W. HUTTON,
Proctor for Appellant.

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A. E. COOLEY,

Proctor for Appellees.

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THE AMENDED LIBEL DID NOT STATE A CAUSE OF ACTION.

Inasmuch as this appeal is taken from an order sustaining respondents' exceptions to the libel, the allegations therein, for the purpose of this proceeding, must be deemed to be true. They do not, however, state a cause of action in admiralty and the learned trial judge, in sustaining the exceptions and in denying a petition for rehearing, correctly laid down the law upon the points involved. His opinion on the first hearing is printed on pages 17 to 19 of the Apostles on Appeal.

We present three grounds for the support of the decision, any one of which is sufficient.

First. The libel shows that this is an action based upon stockholders' liability for an alleged tort of the corporation, wherein it affirmatively appears that the indefinite or inchoate tort liability has become merged in a judgment, fixing at a definite amount the liability of the corporation. Inasmuch as the stockholders can be held only for the liability of the corporation, the libel defeats itself by showing upon its face that it is an attempt to fix at a different amount the liability of the corporation for the tort—a thing that has been determined by a court of competent jurisdiction. As stated in the opinion of Judge Dooling, "the judgment is now the measure of respondents' liability".

Second. Libelant having selected the State court to fix the liability, should be relegated to that tribunal to enforce it.

Third. This action is not maritime in its nature and the Admiralty court has no jurisdiction over it. It is not claimed that the stockholders themselves committed the tort—which was maritime—but that they are responsible because of the California law governing stockholders' liability. The Admiralty law knows no such thing as a stockholders' liability and a State law cannot give a right in admiralty. The right of action against stockholders is contractual in its nature, but the contract is not maritime; it is one arising by implication from the State law.

We shall discuss these points briefly in the order named.

I.

THE TORT LIABILITY MERGED IN THE JUDGMENT AND THAT JUDGMENT IS NOW THE MEASURE OF APPELLANT'S RIGHTS.

We desire to present this point most strongly to the court, for the reason that it seems of vital importance to stockholders, at a time when most of the business of this country is done through corporations. A man purchasing stock impliedly contracts to pay his proportions of the debts and liabilities of the corporation; he expects every other stockholder to be held liable in the same proportion; and he does not contract for a liability different than that of the corporation.

Under the contention of appellant the corporation's liability may be fixed at one amount and the liability of the stockholders may be fixed upon as many different bases or units as there are stockholders—for there is nothing to prevent a separate suit being brought against each stockholder, and the corporation's liability found to be a different amount in each suit. This would be particularly true in tort actions.

We have no quarrel with counsel's contention that the liability of a stockholder is primary; but that primary liability is for the corporation's debts and liabilities arising from acts of its officers or

agents and not for any individual act or omission of the stockholder. Therefore, when the corporate liability is once fixed by judgment, it is fixed for both corporation and stockholder, although the latter's inchoate liability arose prior to the judgment.

It is our contention that there can be only one action for a given tort and that the tort is merged in the judgment in that action.

Mr. Freeman in his work on "Judgments" (4th Edition) Section 215, states the principle as follows:

"The entry of a judgment or decree establishes in the most conclusive manner, and reduces to the most authentic form that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it is founded, just as they would in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It 'is drowned in the judgment', must be henceforth be regarded as *functus officio*."

See also Sections 216, 217 and 218, *Freeman on "Judgments"*.

Black on "Judgments" (2nd Ed.) Section 9:

"Whatever may be said in regard to a judgment which is rendered upon the actual contract of the parties, it must be perfectly apparent that a judgment upon a cause of action sounding in tort cannot be considered as in any sense a contract. True the judgment merges the action. But that means that the plaintiff cannot afterwards sue upon the original claim or use it otherwise. It does not mean that it is metamorphosed into something diametrically opposite to what it was before."

Id. Section 583:

"'Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it.' This doctrine has also the sanction of the United States Supreme Court and the other federal courts, and is approved and accepted in many of the States, as well as in England."

In *Hawkins v. Glenn*, 131 U. S. 319; 33 L. ed. at page 391, Mr. Chief Justice Fuller said:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

In the case of *Jenkins v. Atlantic Coast Line R. R. Co.*, 179 Fed. 535, it appeared that the defendant had leased its railroad and equipment to the C. N. & L. Co., and for the use of its property was to receive "19 cents a mile and a stipulated car hire". The plaintiff in this action had pre-

viously sued the C. N. & L. Co. in the State court and a judgment had been rendered against her. The defendant pleaded that judgment as a bar to the action. The court held that there was privity between the defendant and the C. N. & L. Co. and that the judgment in the former action was a bar to this action. We quote from the opinion at page 539, as follows:

“The same questions arise in the present action, and the same testimony would probably be offered on both sides. The plaintiff has had her day in court in a forum of her own choosing, wherein every element tending to show negligence upon the part of the carrier was or could have been presented, and a court of competent jurisdiction has decided against her. To use the words of Mr. Justice Campbell of the Supreme Court of the United States:

‘Experience has disclosed that for the security of rights and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation’.”

The reasoning of the above case applies with equal force to the case at bar. In both cases there was privity between the defendant against whom the judgment was rendered, and the defendant or defendants against whom the judgment is sought to be recovered. The *Jenkins* case is founded upon the principle of privity between the parties, and this principle applies with equal force to the case at bar.

In *Emery v. Fowler*, 39 Me. 326, it is held that a judgment in an action for trespass brought

against an employer, is a bar to a subsequent action brought against his employee for the same wrong.

We cite also:

Wilson v. Seymour, 76 Fed. 678;

Henderson v. Bradley, 85 Fed. 508.

Counsel relies upon the dictum from *Young v. Rosenbaum*, 39 Cal. 646 (cited at page 7 of his brief), and apparently contends that this dictum was quoted with approval by this court in *Dolbear v. Foreign Mines Inv. Co.*, 196 Fed. 646. The *Young* case was not cited by this court to support the proposition that a judgment does not merge the right of action upon which it was based—that point was not involved in the *Dolbear* case.

Mr. Freeman, in Section 228 of his work on “Judgments”, pointed out that the opinion in *Young v. Rosenbaum*, so far as it relates to the question of merger is mere dictum and does not correctly state the law. But even taking the language of the dictum at its full face value, it does not follow that the judgment does not merge the right of action against the corporation for tort. It would seem that the court meant by the language used, that a judgment rendered against the corporation did not, of itself, merge the right to sue the stockholders and thus prevent an action against the latter.

Counsel cites also the case of *Larabee v. Baldwin*, 35 Cal. 155, at 168. Had he finished the paragraph

from which he was quoting, he would have given the court the following significant language:

“The judgment only merges and puts in a new form, against the will of both corporation and stockholders, an indebtedness which has already been contracted.”

II.

LIBELANT HAVING SELECTED THE STATE COURT MUST ENFORCE HIS REMEDIES THERE.

While the corporation is not a party to these proceedings, nevertheless its liability must be determined in order that any judgment may be had against appellees, who are sought to be held solely for the liabilities of the corporation. Appellant chose the State court as his tribunal to determine the amount of the corporation's liability. He cannot now come into the Federal court and seek, by indirection, to fix that amount at a larger sum than that determined by the judgment of the State court.

We cite:

Hyatt v. Challiss, 55 Fed. 267;

Bailey v. Willeford, 126 id. 803;

Jenkins v. Atlantic Coast Line R. R. Co.,
supra.

III.

THE ADMIRALTY COURT HAS NO JURISDICTION OF AN ACTION
BASED UPON STOCKHOLDERS' LIABILITY.

An action to recover upon the liability of stockholders is an action at law.

Morrow v. Superior Court, 64 Cal. 383.

It is a liability created by the organic law and by the statutes of the State of California.

Moore v. Boyd, 74 Cal. 167;

Hunt v. Ward, 99 id. 612;

Bank v. Pacific Coast S. S. Co., 103 id. 594.

It is therefore an action to recover for a statutory or contractual liability and is not an action for tort.

Pacific Surety Company v. L. & S. T. & W. Co., 151 Fed. 440.

A right to recover on stockholders' liability is unknown to the maritime law. The State law cannot confer jurisdiction upon an Admiralty court.

The Manhasset, 18 Fed. at page 923;

The Steamboat Orleans v. Phoebus, 11 Peters 175; 9 L. ed. 677 at page 680.

No doubt an action such as this could be maintained on the law side of a Federal court if the citizenship of the parties gave jurisdiction, but the Admiralty jurisdiction is limited and, as heretofore stated, it does not include causes arising out of stockholders' liability.

For the reasons stated herein we submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
March 11, 1916.

Respectfully submitted,

A. E. COOLEY,
Proctor for Appellees.

